JD–210–97
Milwaukee, WI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PABST BREWING COMPANY

and

Cases 30–CA–13063
30–CA–13453
30–CA–13505

BREWERY WORKERS LOCAL 9, UAW
(AMALGAMATED), AFL–CIO

Paul Bosanac and *Benjamin Mandelman, Esqs.,*
for the General Counsel.
George F. Graf, Esq. (Murphy, Gillick, Wicht and Prachthauser), of Brookfield, WI; *Mr. William Bauman*, International Representative, UAW, International Union, of Milwaukee, WI; and *Mr. Jay G. Kopplin,* President, Brewery Workers Local 9, of West Allis, WI, for the Charging Party.
Thomas Knepper, of Milwaukee, WI, and *Jill Gladney, Esqs. (Neal, Gerber & Eisenberg),* of Chicago, IL, for the Respondent.

DECISION

Statement of the Case

LEONARD M. WAGMAN, Administrative Law Judge. This case was tried in Milwaukee, Wisconsin, on November 12, 13, 14, 15, 18, 19, 20, 21, and 22, 1996, December 9, 10, 11, 12, 16, 17, and 18, 1996, and on January 28, 29, and 30, 1997. Upon a charge filed by the Union, Brewery Workers Local 9 UAW (Amalgamated) on September 26, 1995,[1] and amended charge filed by the Union on January 10, the General Counsel of the National Labor Relations Board (the Board), by the Acting Regional Director for the Board's Region 30, issued a complaint against Pabst Brewing Company (Pabst) in Case 30–CA–13063 on June 10. Thereafter, on July 1, the Acting Regional Director issued an amendment to the complaint in Case 30–CA–13063. On October 24, the Regional Director amended the amended complaint in Case 30–CA–13063. Upon the Union's further charges in Cases 30–CA–13453 and 30–CA–13505, filed, respectively, on August 12 and September 12, the Regional Director issued a consolidated complaint in these two cases on October 24. Also, on October 24, the Regional Director issued an order consolidating Cases 30–CA–13063, 30–CA–13453, and 30–CA–13505 for purposes of hearing, ruling, and decision. The complaints in these cases allege that Pabst violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by failing to provide the

[1] All dates are in 1996 unless otherwise indicated.

Union with requested information necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining agent of a unit of Pabst's employees, unilaterally contracting out bargaining unit work, and by otherwise failing and refusing to bargain in good faith with the Union. Pabst, by its answers to the complaints and their amendments, has denied the commission of the alleged unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and Pabst, I make the following

Findings of Fact

I. Jurisdiction

At all times material to these cases, Pabst, a corporation, has manufactured, distributed and sold beer and related products at its facility in Milwaukee, Wisconsin. During the calendar year ending December 31, 1995, Pabst, in conducting its business, purchased and received at its Milwaukee facility products, goods, and materials valued in excess of $50,000 directly from suppliers located outside the State of Wisconsin. During the same period, Pabst sold and shipped from its Milwaukee facility goods valued in excess of $50,000 directly to customers located outside the State of Wisconsin. Pabst admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Background and Issues

Pabst began producing beer in Milwaukee in 1844. Pabst also has the Pearl Brewing facility in San Antonio, Texas, and a brewery at Tumwater, Washington. Until 1985, Pabst was a separate public corporation. Since 1985, S & P Corporation, headquartered in Mill Valley, California, has been Pabst's parent corporation.

Pabst and the Union have a bargaining history which began about 100 years ago. At all times material to these cases, Pabst recognized the Union as the exclusive collective-bargaining representative of the following appropriate unit:

> All production, maintenance and other employees employed by Pabst in its Milwaukee Division operations as more fully set forth in the parties' collective–bargaining agreement effective from June 1, 1993, to June 1, 1996; excluding office clerical employees, guards and supervisors as defined in the Act, and all other employees.

In the course of this collective-bargaining history, Pabst was part of a multiemployer group, which included the Schlitz and Miller brewing companies. However, beginning in 1983, Pabst independently negotiated collective-bargaining agreements with the Union. The most recent of this succession of collective-bargaining agreements was effective from June 1, 1993, until June 1.

In June 1995, Pabst gave notice to the Union of an opportunity it had to enter into a production contract with G. Heileman Brewing Company. From June 9, 1995, until September 7, 1995, Pabst and the Union held a series of meetings in which the parties discussed the contemplated Heileman agreement and what concessions would suffice to justify abandoning the proposed contract with Heileman. Pabst insisted that Article XVI, Section 2 of the 1993 collective-bargaining agreement afforded it the right to enter into the proposed contract without

bargaining with the Union. In June and July 1995, the Union requested that Pabst provide it with documentation to verify the projected savings and costs associated with the proposed Heileman contract. The Union repeatedly requested such documentation during the meetings leading up to Pabst's announcement on September 7, 1995, that discussions had ended, and that it would contract with Heileman for the production of a substantial portion of the barrelage currently produced at Milwaukee. On the same date, Pabst tendered a concessionary proposal which the Union rejected.

On September 13, 1995, Pabst signed a letter of intent to contract with Heileman for the production of not less than 1.4 million bbls.of beer annually. On November 10, 1995, Pabst and Heileman executed a 3–year agreement, effective from January 1, which required Pabst to order a minimum of 1,4 million bbls. of beer annually. If Pabst failed to purchase the minimum quantity, it agreed to pay $5 times the difference between 1.4 million and the number of barrels purchased during the year in question. Heileman began production under that agreement on January 1.

On May 1, Pabst and the Union began negotiations for a new collective-bargaining agreement to succeed the agreement which would expire on June 1. As of June 1, the parties had not arrived at an agreement, and Pabst had not offered a complete economic proposal. Negotiations continued until the parties' last bargaining session, on July 25, at which time Pabst presented a complete economic proposal requiring the Union to make large concessions. Pabst submitted its final contract proposal to the Union on August 26. On September 13, Pabst declared that the parties had reached an impasse and announced implementation of its final contract proposal effective September 16.

By letter to the Union, dated October 17, Pabst advised that it had decided to transfer the current production at its Milwaukee brewery to Heileman. In the same letter, Pabst offered to discuss "the effects of this management decision."

The issues presented in these cases are whether Pabst violated Section 8(a)(5) and (1) of the Act by:

1. Unilaterally modifying the 1993 collective-bargaining agreement by entering into the production contract with Heileman on November 10, 1995, and removing unit work to Heileman.
2. Failing and refusing to provide the Union with requested documentation and verification of cost information pertaining to the proposed production agreement with Heileman.
3. Delaying compliance with Union requests for documentation and verification of cost information pertaining to the proposed production agreement with Heileman.
4. Failing to allow a reasonable opportunity for the Union to use the information which Pabst provided to the Union on September 5 and 6, 1995.
5. Refusing to meet with the Union since September 7, 1995, to consider a new Union written concessionary proposal or to otherwise bargain regarding Pabst's proposed transfer of bargaining unit work to Heileman.
6. Refusing on and after December 21, 1995, to provide a copy of the Heileman production agreement to the Union, as requested.
7. Failing and refusing to bargain with the Union in good faith regarding a collective-bargaining agreement since May 1.
8. Refusing, since on or about July 25, to honor the Union's request for a complete copy of Pabst's Heileman and Stroh's production agreements, respectively.
9. Declaring an impasse on September 16, and implementing its last contract proposal.

10. Announcing on October 17, the transfer of all production at the Milwaukee brewery to Heileman and the layoff of bargaining unit employees without affording the Union an opportunity to bargain about Pabst's decision in this regard.

III. The Alleged Unfair Labor Practices

A. The Heileman Contract

1. The facts[2]

Near the end of May 1995, Union President Jay Kopplin telephoned Pabst's corporate director of industrial relations, Gary L. Lewitzke, to check up on a rumor about a movement of production from Milwaukee. Lewitzke replied that the rumors were false. He also said that Gary Jansen, Pabst's corporate director of quality control, had visited Heileman's LaCrosse, Wisconsin plant to look at it in connection with future bidding on a contract with The Stroh Brewery Company.

On June 8, 1995, Lewitzke notified Kopplin that there was more to the rumors about potential movement to Heileman at LaCrosse and invited him to meet at Pabst's Milwaukee facility on the following day. Lewitzke agreed that Kopplin could bring Chuck Hoffmann, a union officer, to the meeting on June 9, 1995. On that day, Kopplin and Hoffmann met at Pabst with Lewitzke and Plant Manager Valentine G. Pickett. Lewitzke reported that Pabst was planning to transfer approximately 1.4 million bbls. of beer production to G. Heileman Brewing Company's LaCrosse, Wisconsin plant, at a savings of $1.5 million. Lewitzke said that future employment at Milwaukee would hover at about 120 employees. He went on to assure the union officers that Pabst would issue the necessary WARN notice to the employees. At the time of this conversation, the bargaining unit's strength was approximately 380. Kopplin asked if there was anything the Union could do to retain the production at Milwaukee. Lewitzke replied that he would check with his boss. Lewitzke's boss was Pabst's President Lutz Isslieb. The parties agreed to meet on June 19, 1995.

Lewitzke and Plant Manager Pickett met with Kopplin, other union officers, and UAW International Representative Bill Bauman, at the Union's headquarters, on June 19, 1995. Lewitzke announced the possibility that Pabst might move some barrelage to Heileman's LaCrosse brewery. Lewitzke remarked that Pabst could save $5.5 million annually by transferring most of its production to LaCrosse. He asserted that Heileman's fixed costs per barrel were $8 below Pabst's fixed costs per barrel. Pabst's representatives stated that if the transfer of barrelage occurred, approximately 100 employees would remain working at its Milwaukee brewery. The Union's representatives suggested that the current collective-bargaining agreement prohibited Pabst from transferring Milwaukee production to another brewery.

Bauman insisted that the Union's members should not suffer the $5.5 million burden alone. He pointed out that there were salaried employees and other groups of Pabst employees not represented by the Union, who could share in the effort to reduce costs. When Bauman asked for the timetable for the production transfer, Lewitzke replied that there was no

[2] Except as noted below in fn. 3, my findings of fact, regarding the parties' conduct in 1995, are based on the testimony of participants in the discussions and correspondence which passed between Pabst and the Union in 1995, and the notes made by participants in those discussions, which I received in evidence.

set schedule and that the matter was under discussion. Lewitzke also sought to minimize the concessions needed to keep the production at Milwaukee. He remarked that a few holidays and a few weeks' vacation would provide the necessary cost cutting.

Raising the Union's need to verify Pabst claims that it would save $5.5 million annually by transferring most of its Milwaukee production, and that it was contemplating an annual loss of $30 million, Bauman sought access to Pabst's books and records. Pabst's representatives expressed doubt as to their obligation to provide such access, as they were not saying that they needed concessions because Pabst was losing money. Pabst wanted concessions to enhance its income. Bauman suggested that Pabst's representatives meet with the Union's bargaining committee and explain the need for concessions by the bargaining unit employees.

Pabst representatives met with the Union's officers and bargaining committee at the brewery on June 26, 1995. Lewitzke repeated his earlier assertion that Pabst could save money by transferring barrelage to Heileman. He now claimed that such a transfer would result in an annual savings of $7.5 million. The Union asked where the additional $2 million in savings would come from. Lewitzke and Plant Manager Pickett explained that Pabst had a $10.5 million increase in the cost of aluminum cans for 2.5 million bbls and an increase in pension payments and other fringe benefits. Pickett also spoke about capital expenditures which would be necessary if Pabst continued to operate in Milwaukee on a long-term basis. During this meeting, Lewitzke warned that there was only a limited window of opportunity in which Pabst could decide on the option of transferring barrelage to Heileman. The Union asked if Pabst had obtained U.S. Justice Department approval of the transfer of barrelage to Heileman. On this occasion, Pabst did not answer the question. However, I find from William Bauman's testimony, that later in the discussions, Pabst said it did not need such approval for the contemplated transfer of barrelage to Heileman.

The Union expressed interest in reviewing Pabst's books and seeking a compromise which would keep jobs in Milwaukee. Lewitzke countered that Pabst was not coming to the Union and pleading for economic relief. Lewitzke went on to say that Pabst was not looking to open its books to the Union nor seeking the Union's help. Instead, he pointed out that Pabst had an opportunity to make money by sending the barrelage elsewhere and was telling the Union that it needed concessions of $7.50 per hour from the bargaining unit employees. Bauman asked Lewitzke to put something in writing about the proposal to move production to Heileman. Lewitzke agreed to fax something to the Union that afternoon.

Bauman asked Pabst to provide statistical data and costs to permit calculation of its hourly costs. He also suggested that the parties agree on the methodology. Lewitzke agreed to share calculations of the costs of benefits with the Union.

The Union asked about a guarantee of jobs. Lewitzke replied that the closest guarantee he could give would be to extend the current collective-bargaining agreement until June 1998.

There was some discussion of Pabst's pension obligations. The Union suggested that Pabst was seeking escape from its responsibility in this regard. Bauman insisted that other groups of Pabst's Milwaukee employees, who the Union did not represent, share in the concessions. He also stated that if the parties were unable to reach an agreement to keep all the current barrelage at Milwaukee, the current collective-bargaining agreement would remain in effect until its expiration date in 1996.

On June 28, 1995, after the Union had not received the promised fax from Lewitzke, President Kopplin addressed a letter to Pabst requesting information regarding the planned

transfer of barrelage to Heileman. The Union's letter asked that Pabst "set forth, in writing in a letter to the Union, the specific details of these plans."

In a second letter bearing the same date, Kopplin asked Pabst for information regarding U.S. Justice Department approval, "detailed information with respect to all costs associated with retaining the production at the Milwaukee facility," and "a copy of the proposed contractual arrangement between [Pabst and Heileman] . . . ." The same letter sought information regarding any existing or pending agreements covering the movement of production out of Milwaukee, including an agreement with Stroh Brewing Company. The Union's request for information also included "a copy of any and all actuarial reports or studies pertaining to a withdrawal, partial withdrawal, or reduction of hours of work at the Milwaukee Brewery."

By letter dated June 29, 1995, Lewitzke provided the written notice of Pabst's plan to transfer a significant portion of its Milwaukee barrelage to Heileman at LaCrosse, Wisconsin. The letter also announced that under the contemplated transfer, the bargaining unit labor force at Milwaukee would diminish by approximately 280 employees. Lewitzke pointed out that the letter and Pabst's notification at the meetings were in accordance with Article XVI, Section 2 of the parties' collective-bargaining agreement. The letter went on to announce that Heileman had offered to produce beer for Pabst for "approximately $8.45 per barrel below the cost to perform this work at [Pabst's] Milwaukee brewery."

Lewitzke's letter held out the possibility that Pabst would consider retaining the work at Milwaukee. He wrote:

> The Company invites the Union to consider and to offer any proposal, including contract concessions, which would make it economically feasible to retain this work at the Milwaukee brewery. The Company currently estimates that contract concessions on the order of approximately $9.70 per hour would be required in order to make retention of the work at Milwaukee feasible.

The letter went on to express Pabst's intention to review its plans and prospects involving the contemplated transfer of production from Milwaukee, with the Union, and to discuss with the Union the effect of the transfer on the work force and the reasons for the action. However, Lewitzke declared that "under Article XVI, Section 2, the parties have agreed that on matters of this nature 'the ultimate decision is solely that of management.' "

Lewitzke's letter warned that if the parties did not reach agreement on some alternative, "including contractual concessions, which would make it economically feasible to retain this work in Milwaukee," Pabst would transfer the work to Heileman "starting approximately September 6, 1995." Lewitzke acknowledged receipt of the Union's letter requesting information and assured the Union that Pabst was reviewing it. He promised a response "as soon as possible."

By letter of July 5, 1995, to Lewitzke, Bauman asserted that he was seeking authority from the Union's membership to enter into exploratory discussions with Pabst to retain the production at the Milwaukee brewery. In the same letter, Bauman declared that unless the parties reached agreement on the retention of production at Milwaukee, the current collective-bargaining agreement would remain effective until its expiration on June 1. Bauman concluded with a request for dates to begin discussions.

On the following day, Bauman, in a letter to Lewitzke sought detailed cost information

regarding Pabst's statements that it expected of an $8 or $8.25/bbl. savings if it went through with its transfer of production to Heileman. Bauman's letter also asked for similar information in support of Lewitzke's claim in his letter of June 29 that Heileman had offered to brew Pabst beer for $8.45/bbl. less than the cost to produce it at the Milwaukee brewery. Finally Bauman asked for Pabst's written detailed explanation of its three different demands hourly for concessions, $5.50, $7.50, and $9.70.

In a letter dated July 6, 1995, Lewitzke replied to President Kopplin's letter of June 28, 1995, requesting information regarding the transfer of production to Heileman. Lewitzke, on Pabst's behalf, responded as follows:

> 1. U.S. Justice Department approval is not necessary.
> 2. The cost savings associated with the movement of production is the figure referred to in my letter of June 29, 1995, to you.
> 3. The Company will review with you and your Committee, costs associated with retaining production in Milwaukee.
> 4. The Company, at this time, does not have a written, proposed contractual agreement with G. Heileman Brewing Company.
> 5. The Company does not have alternative plans on movement of production out of Milwaukee, other than the Heileman offer.
> 6. The Company previously stated that approximately 280 of your members would be affected.
> 7. The Company expects approximately 1,400,000 barrels to be moved out. Details on brands and packages have not been resolved.
> 8. We do not have any detailed cost information for G. Heileman Brewing Company. The offer from Heileman is approximately $8.45 per barrel less than ours.
> 9. The Marketing area and Distributors have not been determined.
> 10. The discussion with G. Heileman first began the week of May 22, 1995.
> 11. Current contract discussions with other Unions have had no impact on these discussions.
> 12. The Officers, Estate Executives or other Principals do not have financial holdings in G. Heileman Brewing Company or other companies not associated with S & P Corporation.

Lewitzke's letter concluded with: "The Company is available to discuss this further."

In a letter dated July 7, 1995, Lewitzke responded to Bauman's letter of the previous day seeking cost information. Lewitzke rejected the request on the grounds that the information regarding costs was complex and "contains proprietary, confidential, and trade secret data." However, Lewitzke went on to assure the Union that Pabst would present the requested information "in a face–to–face meeting."

On the same date, the Union made another detailed request for a written breakdown of the hourly costs of employment for its members. The Union sought a complete, detailed break–down of rates of pay and fringe benefits on an hourly basis, and a detailed statement of monthly benefit costs pertaining to medical and dental care benefits.

The Union and Pabst resumed discussions on July 11, 1995. Pabst asserted that $1.6 million would be needed for capital improvements to continue producing beer at Milwaukee. The Union renewed its request for detailed costing information. The Union pressed for an

explanation of how Pabst had concluded that it could save an additional $2.2 million by transferring 1.4 million bbls. of production to Heileman. Lewitzke explained that Pabst expected to realize that amount by leveraging the Heileman contract against the upcoming Stroh's contract agreement on the East Coast. Bauman asked whether, if Pabst did not reach agreement with Stroh, that barrelage would return to Milwaukee. Lewitzke replied that shipping costs between Milwaukee and the East Coast would prohibit the return of that production to Milwaukee. Bauman responded that in that case, Union should not be expected to pay for that $2.2 million.

During this meeting, Pabst disclosed that its fixed costs were $13.45 per barrel and that the expected savings from the Heileman contract would be $4.04 per barrel. Pabst expected to transfer 1.4 million bbls. of its annual production to LaCrosse and retain 750,000 bbls. of production at its Milwaukee brewery.

The parties met next on July 14, 1995. A Blue Cross representative began the meeting with a presentation of alternative insurance plans. Bauman asked Pabst to provide the Union with verifiable proof of Heileman's offer and Pabst's costs. He also asked that Pabst give a capital projects list to the Union, as well as verification of the claims that Heilman's offer was $8.45 per bbl. below Pabst's costs, and that Pabst would have a net saving of $4.04 per bbl. Continuing, Bauman requested access to Pabst's books and records of account and asked what the Union's share of the concessions would be.

Bauman insisted that the Union's share of the concessions should be 65 per cent or two–thirds. He also asked Pabst to guarantee employment stability if the Union agreed to the concessions needed to retain the production at Milwaukee. Bauman suggested that if Pabst began to see a profit in its operations, provision be made to share it with the employees who made the sacrifices. Lewitzke said that Pabst would not respond to Bauman's requests and suggestions until the next meeting of the parties, on July 17, 1995.

When the parties met on July 17, 1995, Lewitzke supplied responses to some of the Union's requests. He gave an outline of costs. Lewitzke told the Union that the fixed cost per barrel for the 2.3 million barrels of beer produced at Milwaukee was $13.45, and that this figure would rise to $22.49, if that production sank to 750,000 bbls. Pabst presented a list of proposed capital improvements which it deemed necessary if the Milwaukee brewery continued to operate. Pabst also presented an unsigned letter of intent from Heilemen to Pabst, which recited a brief summary of their proposed agreement and referred to a "definitive Production Agreement to be executed by both parties."

On July 25, 1995, the parties held their next meeting. Lewitzke warned that time was running and the parties needed to "get moving on this." He presented Pabst's proposal, under which the Union would make concessions in wages and benefits totaling $9.50 per hour per unit employee. Under Pabst's proposal, the unit employee would suffer a reduction of $4.25 in their hourly wages. Pabst's proposal anguished the Union's bargaining committee, its president, and Bauman. They caucused to review what the Union's representatives saw as an unacceptable reduction in wages and benefits.

Following the caucus, the Union offered a counterproposal. In an effort to retain bargaining unit employment, the Union sought elimination of Article 16 from any contract extension, guaranteed annual production of 2 million bbls. at Milwaukee, and a prohibition against any transferring or subcontracting of unit work. The Union proposal also included a supplemental unemployment benefit plan to be effective in 1997 or 1998 and improvements in the existing pension plan to be effective in 1997. The Union's proposal also included

concessions in wages and fringe benefits. The Union proposed an hourly wage reduction of 50 cents. Bauman intended to show Pabst that the Union was willing to sacrifice $14 million over the term of an extended agreement. The meeting concluded with a discussion of how the Union had costed its proposal. Pabst said it need some time to evaluate the Union's proposal. The parties agreed to resume on the morning of July 27, 1995.

The parties resumed as agreed. Lewitzke reported that the Union's proposal would add to Pabst's costs. After some discussion of the Union's contract proposal, the parties took a 5–hour recess. When the parties resumed their discussion, Pabst responded to the Union's proposal. Lewitzke withdrew Pabst's insistence that the bargaining unit employees be burdened by a $2 million charge representing the leveraging of the Stroh agreement. He proposed that the Union's members make concessions totaling $5,269,000, equal to 72 percent of the savings Pabst expected from the Heileman contract and the capital expenses which Pabst would not experience if it transferred 1.4 million bbls of production to LaCrosse. Lewitzke presented a detailed proposal embodying concessions in wages and fringe benefits which would provide savings of $5,273,205 per year out of the contemplated annual savings of $7,318,189. The Union insisted that it needed access to Pabst's cost data to put values on the hourly value of fringe benefits. Pabst's bargaining representatives acknowledged that need.

On August 7, 1995, Bauman, accompanied by Michael Schippani, a financial analyst employed by the the United Auto Workers International Union, visited Pabst's Milwaukee plant to obtain cost data. Schippani and Bauman met with Lewitzke and Bud Kempen, the Milwaukee brewery's comptroller. Using summary sheets which the Union had already obtained from Pabst, Schippani began to question Kempen about the derivation of stated costs. However, Kempen did not give informative answers and seemed restrained to Bauman.

When the parties met next, on August 8, 1995, Schippani accompanied Bauman along with the other members of the Union's negotiating group. Bauman began the meeting with a statement of the Union's position. He said the Union had made a significant offer which would substantially decrease Pabst's labor costs. Bauman went on to repeat his insistence on an equal distribution of sacrifice between the Union's members, the salaried employees, and the splinter union employees. He also mentioned his demands that Pabst agree to removal of Article XVI and its subcontracting authority and that it guarantee a minimum production barrelage at Milwaukee. Bauman also reminded Pabst of the Union's proposals for supplemental unemployment benefits, pension improvements, and a contract extension until May 31, 1998. Bauman took exception to Pabst's claims regarding the benefits of moving production to Heileman at LaCrosse. He also complained that Pabst had failed to provide data which the Union needed to evaluate those claims. Bauman complained that Pabst intended to reduce the hourly work force by over 60 percent and the salaried group by only 48 percent. He also expressed worry that Pabst would escape its obligation under the pension plan.

Mike Schippani raised some questions about Pabst's fixed operating costs and the effect of the reduced production at Milwaukee on those figures. He asked for an updated letter of intent from Heileman which might show the purchase price per barrel. Schippani asked for a signed letter of intent from Heileman, and the detailed schedules from which salaries, wages, costs of benefits, and costs of raw materials had been derived. Schippani also asked for layoff and severance costs, transportation costs, detailed schedules of sales and general administrative costs tools and equipment costs, inspection and quality control expenses to Pabst, pension costs, and for depreciation costs to Pabst, all growing out of the Heileman deal.

Harvey Adelstein, an attorney sitting in with Pabst's officials at this discussion, said that it was "sort of late in the game" to be asking for this data. Bauman complained that the Union

had been asking for this data. Adelstein pointed out that the previous day's meeting at Pabst was to have remedied the Union's need for such information. Bauman replied that Bud Kempen had not been forthcoming with anything more than yes or no. Adelstein announced that he and his colleagues would take a break and consider the Union's requests.

Following the recess, Adelstein asserted that the letter of intent, dated July 5, 1995, was all the documentation Pabst had and there was no contract to verify. He warned that the Union "had better assume a $4.04/bbl. savings." In the discussion that followed, Adelstein said Pabst was evaluating the Union's requests for data. However, after the recess, Pabst gave some new data to the Union and provided responses to some of Schippani's requests for information. However, Adelstein did not provide any data to support these responses. He asserted that "a lot of this info is confidential" and that Pabst needed to "keep it as such."

On the evening of August 8, 1995, or on the following day, Bauman and Adelstein discussed the Union's requests for cost information from Pabst. Adelstein conceded that the Union was entitled to the requested information and that he understood its importance in verifying claims. He asserted that he was having difficulty obtaining it from Pabst. Bauman replied that he understood that Adelstein would need more time to obtain the requested information.[3]

The parties met on August 9, 1995. Schippani said he needed "the UAW costs broken out." Adelstein replied that Pabst needed time to insure the accuracy of the data to be given to the Union. It was agreed that the meeting would adjourn and that Bud Kempen would contact Schippani when the data was available, and the two would meet to work out the necessary figures. Once the figures were established, the parties would meet again to seek agreement.

On August 15, 1995, Schippani telephoned Kempen to inquire about what was happening. Kempen said that Pabst had not give him any further instructions regarding the release of information to the Union.[4] A few days later, Schippani notified Bauman that Kempen was not providing the requested information. In a subsequent conversation with Lewitzke, Bauman learned that Pabst had not authorized release of the information which the Union had requested. However, Lewitzke and Bauman agreed that on September 5, Schippani would come to Milwaukee, and obtain the requested data from Pabst. Lewitzke and Bauman also scheduled a meeting between Pabst and the Union for September 6 and 7, 1995.[5]

On September 5, 1995, Schippani met with Kempen and Lewitzke in Pabst's conference

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[3] I based my findings regarding Bauman's conversation with Edelstein, between the parties' meetings of August 8 and 9, 1995, on Bauman's testimony. Edelstein testified that he had no independent recollection of the conversation. However, he conceded that he may have had a conversation with Bauman during that hiatus between meetings. As Bauman seemed to be giving his recollection of this conversation in a candid manner, I have credited his account.

[4] My findings regarding Schippani telephone conversation with Kempen on August 15, 1995, are based on Schippani's uncontradicted testimony. Kempen did not testify.

[5] My findings regarding Schippani's report to Bauman, and Bauman's conversation with Lewitzke scheduling meetings for September 6 and 7, 1995, are based on Schippani's and Bauman's credible testimony. Lewitzke, whose recollections were incomplete, testified that he had no recollection of any conversation prior to September 6 regarding Schippani's visit to Pabst's Milwaukee facility, on September 5 or 6, 1995, to obtain cost information from Kempen. Lewitzke testified that the parties scheduled a meeting for September 6, 1995.

room. Lewitzke asserted that Heileman would be producing beer for Pabst at LaCrosse and at Baltimore, that the annual savings to Pabst would be $12.66 million, and that the Union would face added fixed costs which would accrue from the production of 750,000 bbls. at Milwaukee. Lewitzke said that the fixed cost per barrel at Milwaukee for that volume would be $22.49. Pabst gave an information sheet to Schippani comparing the cost of goods sold at Milwaukee for the 6 months ending June 30, 1995, with projected cost of producing the same volume of beer at Heileman. The same sheet showed that the cost of producing a barrel of beer at Milwaukee had risen in the past 6 months from $52.08 to $54.28.

On the following day, Bauman, Schippani, and Kopplin, the Union's president, met with Lewitzke, Kempen, and Adelstein in Lewitzke's office. Bauman complained that Pabst had not given the requested cost data to Schippani. Also, Schippani asked Kempen for the Heileman variable cost data. Kempen replied that the requested information was in his office and invited Schippani to pick it up there. At Adelstein's suggestion, Kempen went to his office, copied the data, returned to Lewitzke's office, and gave it to Schippani.

Bauman told Pabst's representatives that the Union needed verification of the claim that Heileman would produce beer for Pabst at the costs set forth in the letter of intent. Adelstein replied that Pabst would never pay more than forty some dollars per barrel to Heileman. Bauman insisted that the Union needed verification of that figure. Bauman referred to the letter of intent which stated that Pabst's cost in the first year would be $5 plus Heileman's variable costs per barrel, $5.50 plus variable costs per barrel in the second year of the contract, and $6.26 plus variable costs per barrel in the third year of the contract. Adelstein dismissed the letter and assured Bauman that Pabst would never pay more than the forty plus dollars per barrel previously mentioned by Adelstein. Bauman insisted that the Union needed information to verify Adelstein's claim. Adelstein said that the Union would have to assume the truth of his claim, and that Pabst had no additional information to give to the Union.

During the discussion on August 6, 1995, Adelstein tendered a confidentiality agreement to the Union, which Lewitzke had already signed on behalf of Pabst. Bauman accepted the letter and filed it.

Schippani received sufficient information from Bud Kempen, late on the same day, to calculate the unit employees' costs and prepare for negotiations. Pabst did not provide any verification of Heileman's projected costs. However, the parties agreed to adjourn until the following day. As the Union's representatives were leaving Lewitzke's office, Adelstein announced to Bauman that Pabst would make a proposal at the next meeting.

At the meeting on September 7, 1995, Pabst presented a final contract proposal. Pabst's final contract proposal called for substantial concessions in wages and fringe benefits, and included a subcontracting provision which Bauman viewed as giving Pabst more authority to remove all production from Milwaukee, at its discretion. Lewitzke reviewed the economic provisions for Bauman and the Union's negotiating committee and showed that the concessions per year totaled $4,973,075.

The Union caucused and returned to discussions with Pabst's representatives. Bauman complained that Pabst had not given the Heileman cost information to the Union, and that the Union had not had time to analyze the bargaining unit cost data which Pabst had withheld from the Union until the previous day. Bauman contended that Pabst was not acting fairly toward the Union's members in the allocation of economic sacrifice between hourly paid and salaried employees.

Adelstein insisted that this was Pabst's final proposal and asked for the Union's response immediately. Bauman rejected the proposal. He suggested that the parties begin bargaining about the effects of the Heileman deal on the bargaining unit employees. Pabst declined to meet any further with the Union, asserting that bargaining was over.

By letter dated September 8, 1995, Pabst notified the Union's bargaining unit employees of the final proposal and its rejection by the Union. The letter announced that Pabst would soon make a decision on whether to enter into an agreement with Heileman to produce a portion of the beer which was then being made in Milwaukee.

Five days later, Pabst notified the Union that it had decided to enter into a production agreement with Heileman. Thereafter, in September 1995, the Union sought renewal of negotiations with Pabst. Pabst met with the Union on September 26, but only to clarify its final offer of September 7. By letter dated October 3, 1995, Lewitzke rejected the Union's continuing effort to negotiate. In this letter, Lewitzke declared that:

> [D]ecisional bargaining has ended and the Company has made a final, irrevocable decision to transfer a substantial portion of its beer production currently performed at the Milwaukee Division to the G. Heileman Brewing Company.

On September 13, 1995, Pabst signed a letter of intent to enter into a contract with Heileman, under which the latter firm would produce no less than 1.4 million bbls. of beer per year. On November 10, 1995, Pabst executed a 3-year production agreement with Heileman.

By letter dated November 15, 1995, Bauman asked Lewitzke for a copy of the Pabst–Heileman production agreement. In a written response to Bauman's request, Lewitzke asked Bauman to explain the relevance of the production agreement to Bauman's "representational responsibilities." Bauman's explanation came in a letter dated December 14, 1995. He pointed to a pending grievance growing out of the Heileman agreement, the Union's contention that the agreement violated the Act, and the forthcoming negotiations for a new collective-bargaining agreement as reasons for the Union's request. In a letter dated December 21, 1995, Lewitzke rejected the Union's request on the ground that the production agreement was irrelevant to the Union's bargaining responsibilities. Lewitzke's letter expressed Pabst's concern about maintaining the strict confidentiality of the "sensitive trade information contained" in the requested agreement. However, the letter did not suggest a confidentiality agreement.

On January 1, Heileman began production for Pabst under that agreement. Thereafter, as a result of the Heileman agreement, Pabst laid off 242 of its brewery workers.

Pabst claims that its right to enter into the production contract with Heileman without bargaining with the Union in accordance with Section 8(d) of the Act[6] arose from Article XVI, Section 2 of their 3–year collective-bargaining agreement effective from June 1, 1993, until June 1. That portion of the collective-bargaining agreement provided:

[6] Sec. 8(d) of the Act, in pertinent part, defines the duty to bargain as the "performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement . . . . "

Article XVI
Management

Section 1. . . . .

Section 2.

(a) The Employer shall have the right to transfer any work being or scheduled to be performed by employees covered by this Agreement to any other plant or facility operated by the Pabst Brewing Company or to any other company with which the Pabst Brewing Company currently has in effect a contractual arrangement or to any other company with which Pabst Brewing Company in the future may have a contractual arrangement with U.S. Justice Department approval.

(b) The Employer agrees that the Brewing, Packaging/Shipping Department (including Delta) and Draught Beer Functions together with on–premise Power Plant Operations and such General Trucking in Milwaukee County as deemed necessary by the Company relating to the production of beer determined by Management to be produced at the Milwaukee Division will not be contracted or subcontracted out to another Company.

(c) The Employer shall have the right to transfer, contract or subcontract out any work being or scheduled to be performed by employees covered by this Agreement other than as limited in (b) above.

(d) In all cases where the Employer is contemplating the transfer, contracting or subcontracting out of work which will result in a reduction in force, it shall give the Union reasonable notice, but not less than sixty (60) days prior to the action being taken in relation to (c) above and as much time as is feasible in relation to (a) above for the purpose of discussing the matter with the Employer. In these discussions, the Employer agrees that, if applicable, it will review its plans or prospects involving the transfer, contracting or subcontracting out, the nature and scope of the contemplated action, the effect on the work force and the reasons for the action. It is understood that the ultimate decision is solely that of Management and this Article XVI, Section 2 in no way applies to normal volume or business fluctuations.

2. Analysis and conclusions

a. <u>The Heileman agreement</u>

For the reasons stated below, I find that Pabst had no statutory obligation to bargain over its decision to enter into the Heileman production agreement. I also find, for reasons set forth below, that Pabst's conduct during its discussions with the Union, between June 9, 1995, when such discussions began, and September 13, 1995, when Pabst signed a letter of intent to enter into the Heileman contract, did not violate Section 8(a)(5) and (1) of the Act.

In *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 210 (1964), the Court held that the subcontracting of maintenance work was a mandatory subject of collective–bargaining under Section 8(d) of the Act. Continuing, the Court noted: "The inclusion of 'contracting out' within the statutory scope of collective-bargaining also seems well designed to effectuate the purposes of the . . . Act." Id. at 211. Here, I find that the decision to contract out the production of 1.4 million bbls. of Pabst's Milwaukee beer production to Heileman was a mandatory subject of bargaining under *Fibreboard*. Accord: *Palace Performing Arts Center*, 312 NLRB 950, 959–960 (1993).

The next issue is whether the Union contractually waived its statutory right to bargain

over the decision to contract out production to Heileman. In making that determination, I am guided by the Court in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983), where it held that a union's waiver of a right under the Act "must be clear and unmistakable." (Citations omitted.) Accord: *Teledyne Industries,* 275 NLRB 520, 524-525 (1985). Here, the parties disagree on the interpretation of Article XVI, Section 2 of their 1993 collective-bargaining agreement, which I have set out above at page 13. Pabst contends that by agreeing to Article XVI, Section 2 the Union waived its statutory right to bargain about Pabst's decision to contract out production. The Union argues that Section 2 did not contain such a waiver. Resolution of this dispute requires careful scrutiny of the disputed provision.

I find that Section 2(a) of Article XVI authorizes Pabst to transfer work from its Milwaukee brewery to any brewery which it operates alone, or to a brewery operated by another company with which it has a production contract, or to a brewery which Pabst and another company, with which it is affiliated, operates. The language which speaks of U.S. Justice Department approval refers to a future production contract or affiliation which, because of its possibly harmful impact on competition in the beer industry, would require Justice Department approval.

In Section 2(b) of Article XVI, Pabst agreed that the employees covered by the collective-bargaining agreement would perform the designated functions related to the production of beer at its Milwaukee brewery and that it would not contract out or subcontract that work to another company. However, in that section Pabst reserved to itself the authority to determine whether there would be any production at Milwaukee. Thus, this provision assured bargaining unit employees that they would produce whatever quantity of beer Pabst decided to produce at its Milwaukee brewery.

Subsection (c) of Section 2 authorized Pabst to outsource any bargaining unit work, without bargaining with the Union, except as limited in Subsection (b). I find that this provision authorized Pabst to enter into contracts for production of beer other than that which it decided to produce at its Milwaukee brewery. If Pabst produced beer at Milwaukee, the Union's bargaining unit of Pabst's employees were entitled to perform the work involved in that production. However, if Pabst decided to have that beer produced at a location other than its Milwaukee brewery, it was free to outsource without complying with Section 8(d) of the Act.

Where, as here, the contemplated outsourcing of bargaining unit work under Section 2(c) would result in a reduction in force, Section 2(d) required Pabst to give notice to the Union not less than 60 days prior to the date of entry into the Heileman agreement for the purpose of discussion between Pabst and the Union. The subsection goes on to set the agenda for such discussion and ends with the Union's and Pabst's understanding "that the ultimate decision is solely that of [Pabst] and this Article XVI, Section 2 in no way applies to normal volume or business fluctuations."

I find that by the language of Article XVI, Section 2(b) and (c), the Union waived its statutory right to bargain collectively about Pabst's decision to enter into the production agreement with Heileman in November 1995. I also find that under Section 2(d), Pabst was obligated to give a 60-day notice to the Union of its intention to enter into that agreement and to enter into a discussion of the topics set out in that subsection of Article XVI.

The next question is whether Pabst, by offering the Union an opportunity to make economic concessions sufficient to induce Pabst to abandon outsourcing, waived its right to refuse to bargain about the Heileman agreement. *Connecticut Light & Power Co.*, 271 NLRB 766, 767 (1984), raised the question whether a party to a collective-bargaining agreement

violated Section 8(a)(5) and (1) of the Act by refusing to bargain over a midterm proposal it proffers when the contract does not include reopener language. In reaching the conclusion that such a refusal was not unlawful, the Board considered the following limitation on the duty to bargain in good faith which Section 8(d) of the Act provides.

> [T]he duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. [Id. at 766.]

The Board held that "in the absence of reopener language . . . Section 8(d) protects every party to a collective-bargaining agreement from incurring any additional bargaining obligations for the duration of the agreement [271 NLRB at 767]." The Board also pointed out that nothing in Section 8(d) of the Act "suggests a party *making* a midterm proposal should be treated differently from a party *receiving* such a proposal" and that " the party proposing a midterm modification does not incur a bargaining obligation by tendering its proposal [271 NLRB at 766-767]."

Consistent with the holding in *Connecticut Light & Power Co.*, above, the Board, in *Herman Bros., Inc.*, 273 NLRB 124 fn. 1 (1984), held:

> For the reasons stated in our recent decision in *Connecticut Light & Power* [supra] we adopt the judge's finding that [the union] did not tacitly agree to reopen the contract, thereby incurring a bargaining obligation, simply by agreeing to discuss the Respondent's proposed midterm wage modifications and offering its own counterproposals.

The Board's holding in *Herman Bros.* (above) is applicable here, where Pabst agreed to discuss its plan to contract with Heileman for the production of 1.4 million bbls. of beer. That Pabst also used these same discussions to explore whether the Union was willing to suffer reductions in wages and fringe benefits in return for an agreement to retain that barrelage at Milwaukee did not impose a bargaining obligation on Pabst. This result is not changed by the parties' characterizations of these discussions as negotiations or bargaining. The Board's interpretation of Section 8(d) of the Act as expressed in *Connecticut Light & Power Co.*, above, determines the result. For "absent an express reopener, neither the union nor the employer ever waives the statutory right to refuse to consider, or to continue to consider, changes in the collective-bargaining agreement while the agreement is still in force. *Herman Bros.,* 273 NLRB at 126." *Standard Fittings Co. v. NLRB*, 845 F.2d 1311, 1316 (5th Cir. 1988.)

It is well established that bargaining in good faith includes the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–153 (1956). In June, July, August, and September 1995, the Union repeatedly sought cost data from Pabst which would assist the Union in its effort to verify the claimed savings ands costs associated with the Heileman agreement. I find that Pabst satisfied some of those requests, but withheld much of the data which the Union repeatedly requested. However, during the discussions which the parties conducted from June 9 until September 7, 1995, Pabst had no obligation to bargain in good faith with the Union. Accordingly, I find that neither Pabst's refusals to furnish requested data, nor its delays in furnishing such data, all of which were not relevant and necessary to the Union's role as bargaining representative of the Milwaukee bargaining unit, did not violate Section 8(a)(5) and (1) of the Act. *Tyson Foods,* 311 NLRB 552, 569 (1993). I also find that

Pabst had no statutory obligation to afford the Union a reasonable amount of time to review cost data which Pabst had provided on September 5 and 6, 1995. Accordingly, I find that Pabst's conduct in this regard did not violate Section 8(a)(5) and (1) of the Act.

In sum, I find that Pabst's treatment of the Union's requests for cost information related to the proposed agreement with Heileman, from June 9 until September 7, 1995, did not violate Section 8(a)(5) and (1) of the Act. Nor do I find that Pabst violated Section 8(a)(5) and (1) of the Act by failing to meet with the Union after September 7, 1995, to negotiate with the Union, or to consider the Union's counterproposals, regarding the proposed Heileman production agreement. Nor do I find that Pabst violated Section 8(a)(5) and (1) of the Act by entering into a 3–year production agreement with Heileman on November 10, 1995. Accordingly, I shall recommend dismissal of the allegations related to the parties' discussion from June 9 until September 7, 1995.

b. Pabst's Refusal to Provide the Union with a Copy of the Heileman Production Agreement

There can be no doubt that an employer has an obligation to provide its employees' bargaining representative with information relevant to the representative's proper performance of its bargaining responsibilities including the evaluation and presentation of grievances. *NLRB v . Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967). Accord: *Arch of West Virginia, Inc.* 304 NLRB 1089, 1092 (1991). The Board has recognized that the Act, in furtherance of the processing of grievances, requires that an employer provide a union with requested information which is "necessary to decide whether to proceed with a grievance or arbitration." *Bohemia, Inc.*, 272 NLRB 1128, 1129 (1984). The Board has also held that the Act requires that an employer provide a union with requested information which is potentially necessary for contract negotiations. *Detroit Newspaper Agency*, 317 NLRB 1071 (1995).

In its initial request for a copy of the Heileman production agreement, on November 15, 1995, the Union did not explain its reasons for seeking that document. Pabst answered with a request that the Union explain the relevance of that agreement to its "representational responsibilities." In its reply, Pabst referred to its concern "about maintaining the confidentiality of the sensitive trade information contained in that document." By its letter of December 14, 1995, the Union provided adequate grounds for its request. The Union explained that it had a grievance pending which alleged that the Heileman production agreement violated the current collective-bargaining agreement covering the Milwaukee brewery and that the Union and Pabst would soon be negotiating a new agreement covering the same bargaining unit. Pabst, by its letter of December 21, 1995, rejected the Union's request on the ground that the Union "had not met its burden of affirmatively demonstrating the actual relevance of the requested document." In the same letter, Pabst again stressed its concern about maintaining the confidentiality of the trade information in the Heileman agreement.

I find that the Union's request sought potentially relevant information. Under Board policy, Pabst's rejection of that request violated Section 8(a)(5) and (1) of the Act, unless Pabst establishes a valid reason why it refused to furnish the information. *Detroit Newspaper Agency*, 317 NLRB at 1071. Pabst's responses to the Union's request for the Heileman production agreement raised "actual relevance" and confidentiality as reasons for refusing to provide a copy of the agreement. Pabst's insistence upon "actual relevance" was not a valid reason under Board policy. Id.

The Board has recognized substantial claims of confidentiality as justification for

refusals to provide otherwise relevant information. 317 NLRB at 1072, and cases cited there. However, where, as here, an employer raises confidentiality concerns, the employer, to escape a finding that its refusal was unlawful, must show that it offered to accommodate its concern for confidentiality with the union's entitlement to the requested information. *Pennsylvania Power Co.*, 301 NLRB 1104, 1106 (1991) Here, Pabst made no offer to bargain toward an accommodation between its need for confidentiality and the Union's need for the requested agreement. Accordingly, I find that Pabst's refusal to provide the Union with a copy of the Heileman production agreement on and after December 21, 1995, violated Section 8(a)(5) and (1) of the Act.

B. The Negotiations for a New Contract

1. The facts[7]

In late March, the Union and Pabst exchanged letters notifying each other of a desire to terminate the current collective-bargaining agreement due to expire on June 1. At their first bargaining session, on May 1, the parties exchanged contract proposals. The Union's contract proposal was in outline form. The Union also presented the Company with a request for the following information for bargaining purposes:

> Current plant seniority list
> Current departmental seniority lists
> Current detailed age category information with corresponding years of service data
> Current data on employees' job qualifications
> Employees' current shift of preference
> Since February 1, 1996, average number of employees per shift, per division
> Current listing of O.S.H.A. certified forklift operators
> Current insurance enrollment data, detailed costs and census figures

The first item in the Union's outline of proposals was: "Guaranteed job and income security, including eliminating all layoffs." As of May 1, the Union had 380 employees on Pabst's seniority list, of whom only 130 were working at Pabst's Milwaukee brewery.

At the same bargaining session, Pabst presented a written compilation entitled "Non–Economic Contract Proposals." Gary Lewitzke reviewed Pabst's proposals in detail and declared that Pabst's goal was to make the Milwaukee plant "cost–effective and keep people working." Pabst's proposals included reduction of the maximum vacation period from 8 to 5 weeks. After a lunchbreak, President Jay Kopplin explained the Union's outline of its proposals. The parties agreed to meet on May 13.

In a letter to Pabst, dated May 8, the Union requested the following additional information:

[7] Except as otherwise stated, my findings of fact in this section of the decision are based on the testimony of Lewitzke, Bauman, Adelstein, and Kopplin and the parties' notes of the 1996 negotiations.

Voluntary layoff figures indicating the number of employees per week who exercise such requests; how long they are off; and how many return only to have their benefits reinstated.
Detailed uniform costs.
The number of employees per week on leave of absences.
Copies of all other labor agreements unions have with Pabst, or any subsidiary thereof.

At the next session, on May 13, the parties discussed the movement of employees by way of layoff, shift selection, and transfers requests between departments. Lewitzke provided some of the information which the Union had requested. Lewitzke also asserted that Pabst's negotiating team had some problems with meeting dates, but that May 21 and 22 were "good." President Kopplin complained that June 1, the expiration date of the current agreement, was coming quickly and that more meetings were necessary to discuss Pabst's "sweeping" proposals.

In a letter dated May 16, the Union asked Pabst for shift change data and the Tumwater Operating Engineers agreement. At the next bargaining session, on May 21, Pabst satisfied these requests.

On May 21, Attorney Harvey Adelstein told the Union's negotiators that Pabst was willing and interested in exploring job security, mentioned in the Union's contract proposal. Continuing, Adelstein warned that Pabst could not and would not guarantee 300 jobs, and would not spend additional money to do so. Adelstein also declared that any settlement had to be a "complete package."

On the following day, the parties met again. The Union offered a proposal to revise Article XVI to deprive Pabst of the right to move barrelage from the bargaining unit. The parties also discussed the Union's goal of full employment for bargaining unit employees. The Union asked for information regarding what work Pabst had contracted out, including brewing, packaging, powerhouse work, and malt hauling. The Union specified that it wanted copies of any contracts covering such subcontracting. At the end of the meeting the parties discussed a meeting schedule. Kopplin said the Union was available to meet every day for the rest of the month, except for a few hours on Memorial Day. Lewitzke replied that Pabst was available for negotiations only on May 30 and 31. Adelstein said that Pabst's negotiators believed they could reach agreement with 2 more days of bargaining. As of May 22, Pabst had not presented an economic proposal to the Union.

In a letter dated May 24, the Union presented its economic proposals based on modifications to be made over a 3–year contract term. In its opening paragraph, the Union's letter complains that Pabst's "extremely limited availability" prevented "open discussions and negotiations," Five days later, the Union followed up with a letter to Pabst, which included an outline of the Union's noneconomic proposals and a reply to Pabst's non–economic proposals. The same letter also repeated the Union's complaint about Pabst's "extremely limited availability." Lewitzke considered the Union's economic proposal to be "very expensive." However, as of May 24, Pabst had not yet presented its own economic proposals.

The next bargaining session occurred on May 30. For the most part, the parties discussed noneconomic topics such as transfers, seniority, and shift preferences. The Union pressed Pabst for an economic proposal. Lewitzke answered that Pabst's noneconomic proposals included part of its economic proposal. Bauman asked about a wage proposal. Lewitzke answered: "It depends on the package that's put together. You have proposals. We

have proposals. As of this moment, not prepared to discuss.'' Bauman asked if Pabst could have a comprehensive proposal on the next day. Lewitzke answered, ''yes.'' In his testimony before me, Lewitzke admitted that as of May 30 he had not talked to Lutz Issleib about an economic proposal and that ''we had not resolved an economic proposal at that point in time.''

During the negotiations on May 30, Pabst handed to the Union a letter from Lewitzke to President Kopplin, in which Pabst rejected the Union's request for information made on May 22. Pabst rejected the request on the grounds that it was ''overly broad and unduly burdensome'' required disclosure of sensitive trade information, and was not shown to be relevant to the Union's collective bargaining duties. The following two paragraphs which closed Lewitzke's letter are worthy of attention:

> Finally, we are troubled by the ''eleventh–hour'' nature of the requests, given the impending expiration of the current collective bargaining agreement. The pendency of an unfair labor practice charge (in part based on information requests similar to and somewhat duplicative of the current requests) and a related grievance, further underscore the questionable timing and motivation of these requests.
>
> It is not [Pabst's] desire or intent to allow these belated and burdensome requests to delay or impede the collective bargaining process. However, [Pabst] does require a further, more detailed showing from the Union in order to properly respond. In the meantime we are reviewing your request so that we can determine the information that we believe to be relevant, pertinent and appropriate. As soon as that is completed we will provide it.

When negotiations between the parties resumed on May 31, Lewitzke asserted that he had reviewed the Union's economic proposal and found it too expensive. The parties proceeded to discuss the movement of employees such as transfers, layoffs and job security. Lewitzke stated that Pabst needed to ''put a total proposal together.'' In further discussion, Kopplin complained that Pabst had provided neither a comprehensive proposal nor the information requested by the Union. Attorney Adelstein conceded that Pabst did not have a comprehensive proposal.

Kopplin asked if Pabst wanted to get in touch with the Union when the proposal was available. Adelstein insisted on setting dates for further meetings. After further discussion, Adelstein offered June 13-14, 19-20, and 27-28. Kopplin asked about meeting in the week of June 3. Adelstein rejected the earlier date and said the schedule he was suggesting would give Pabst more time to "do some homework."

As of May 31, there was no agreement to extend the contract beyond its expiration on June 1 and Pabst had not submitted an economic proposal to the Union. I also find from Lewitzke's testimony that on that date, Pabst had no idea of when it would have an economic proposal to present.

In a letter dated June 5, Kopplin replied to Lewitzke's letter of May 30 regarding the Union's request of May 22 for information. Kopplin explained the Union's need for the requested information as follows:

> [O]ur motivation for this information is for one singular reason, to meet our bargaining objective that all your employees whom we represent have secure full employment. The relationship of this information is for the purpose of determining how we can achieve

> these goals via work being performed by contract, subcontract, or transfer, by direct labor or otherwise, or at another plant or facility, or through contractual arrangement.

Kopplin's letter concludes with a complaint that Pabst has not heeded the Union's requests "to meet regularly to timely conclude negotiations."

In a letter to Lewitzke, dated June 6, Kopplin complained about Pabst's failure "to meaningfully bargain with the Union." Kopplin also complained that Pabst was not showing any urgency about holding negotiating sessions. Referring to Pabst's limited availability, Kopplin's letter complained:

> Then, when asked about future availability you offer dates that are ones that would be expected to be offered at the start of negotiations, not after expiration.

The parties next met on June 18. Pabst began the session by handing to the Union a letter which provided information in response to the Union 's request of May 22, which sought work which Pabst had subcontracted. The letter set out "the subcontracting of non–brewing and packaging work and the resultant effect on the workforce at Pabst's Milwaukee facility." There was no showing in the record that Pabst gave copies of its production agreements with Stroh or Heileman to the Union on June 18 or at anytime thereafter.

Kopplin asked if Pabst had an economic proposal for the Union. Lewitzke answered: "No, not at this time." Kopplin asked if Pabst was saying that it did not have a complete contract proposal for the Union. Adelstein answered that Pabst had not completed its economic proposal and suggested that the Union respond to Pabst's noneconomic proposal.

Bill Bauman rejected the suggestion on the ground that the Union could not properly respond without knowing the extent of Pabst's economic demands. Bauman raised the issue of 52 weeks of job security for the 300 plus employees on the seniority list and invited Pabst to address it. The meeting ended with Bauman repeating the Union's position on that issue and inviting Pabst to suggest a solution to provide 52 weeks' pay for all the employees on the seniority list. The parties took a break. When they returned from their break, the parties agreed to adjourn until the following morning.

The meeting on June 19 began with Harvey Adelstein telling the Union that Pabst could not guarantee 52 weeks' employment for 300 employees. Adelstein also stated that Pabst had no economic proposal to present to the Union. Bill Bauman asked if Pabst was "ready to talk economics." Continuing, Bauman pointed out that 19 days had passed since the expiration of the collective-bargaining agreement and yet Pabst had no economic proposal. Adelstein responded that Pabst was not in a position to present an economic proposal and that it was working on the numbers with outside auditors. He assured the Union that as soon as the review was completed, Pabst would be prepared to discuss economics.

Bauman asked for a response to the Union's economic proposals. Adelstein said that Pabst was rejecting all of them.

Adelstein asked if the Union was conditioning its bargaining on Pabst's capitulation on the Union's demand for 52 weeks of pay for 300 employees. Bauman answered: "Absolutely not, but job security is the key to resolving many of your remaining issues." Bauman recalled that Adelstein had previously stated that Pabst would address the Union's job security concern. Adelstein answered that Pabst was "not prepared to discuss that issue yet."

Bauman persisted in pressing Adelstein to respond to the Union's proposals. Adelstein insisted that Pabst had nothing to present at this time and suggested the need for a Federal mediator. Adelstein was not prepared to talk about job security until Pabst's auditors had completed their review.

Adelstein ended the discussion, assuring the Union that Pabst or a mediator would get in touch with it when Pabst was ready to present an economic proposal. Bauman answered that there was no need for a mediator. When Adelstein suggested that a mediator notify the Union when Pabst was ready, Bauman insisted that the Union did not want to hear from a mediator. Thus ended the parties' discussions on June 19.

On June 19, Pabst filed an unfair labor practice charge in Case 30–CB–3909 alleging that the Union had violated Section 8(b)(3) of the Act by refusing to bargain in good faith. Specifically, Pabst provided the following assertions as ground for its charge:

> During bargaining sessions on June 18, 1996 and June 19, 1996, the above–named Union has refused to bargain in good faith by, for example and without limitation, preconditioning negotiations for a new collective bargaining agreement on [Pabst's] agreement to guarantee work or pay for all employees currently on the seniority list for 52 weeks per year for 3 years and refusing to discuss any [Pabst] proposal regarding any other issue.

This charge was dismissed and Pabst did not appeal.

In a letter to Lewitzke, dated June 21, Kopplin complained that Pabst's "continued unpreparedness when meeting with the Union is unacceptable." In the same letter, Kopplin asserted: "We have yet to receive from you a full and complete comprehensive offer." Kopplin's letter goes on to review Pabst's conduct at the bargaining sessions on June 18 and 19. He also assured Pabst that the Union was not preconditioning bargaining on Pabst's agreeing to 52 weeks of wages for all employees on the seniority list.

Bauman's letter of June 24 to Lewitzke rejected Pabst's unfair labor practice allegations and accused Pabst of "perfunctory, surface bargaining actions." In the same letter Bauman attempted to prod Pabst into setting a date for further negotiations and asserted the Union's availability to meet.

Kopplin's letter of June 26 to Lewitzke expressed shock at Pabst's unfair labor practice charge. Again, Kopplin expressed the Union's readiness to meet with Pabst later in the same week.

Lewitzke, by his letter dated July 2, to Bauman, confirmed their agreement of the previous day that the parties would resume negotiations on July 10 and continue on July 11 and 12, "if necessary." Lewitzke stated that Pabst would bring its outside auditors to the meetings and suggested that the Union brings its financial experts or economists to the negotiations, as well. In the same letter, Lewitzke rejected the Union's complaints about Pabst's conduct.

At the parties' meeting of July 10, Pabst's negotiating team included two Price Waterhouse auditors, Bob Jozwiak and Trent Chambers. I find from Lewitzke's testimony that one of the reasons why Pabst had not presented an economic proposal as of July 10 was that it was waiting for Price Waterhouse's review. Jozwiak and Chambers brought with them several

copies of the 69-page book containing the results of that review. The Union received five copies of the Price Waterhouse book, which was entitled "Milwaukee Brewery Analysis."

The Price Waterhouse analysis presented three brewing scenarios covering a "normalized year" for comparison: (1) all brewing by Heileman; (2) all brewing at Milwaukee, and (3) two-thirds of total barrelage brewed by Heileman and one-third brewed at Milwaukee. The total production for the projected year would be 2,093,000 bbls. Under the third scenario, Heileman would produce 1,400,000 and Milwaukee would produce 693,000 bbls. The analysis defined the "normalized year" used in the comparison as "a pro–forma presentation comparing ongoing operating results under the three brewing scenarios. Under the all–Heileman scenario, the analysis projected an annual operating profit of $3,075,230. The all–Milwaukee projection was an operating loss of $4,779,150. The combination of Milwaukee and Heileman showed an operating loss of $8,625,730. Trent Chambers told the Union's negotiators that the current arrangement with Heileman "isn't working" and that Pabst was "suffering significant losses."

Before handing copies of the Milwaukee Brewery Analysis to the Union, Pabst proffered a confidentiality agreement for signature. The Union declined to sign the agreement and explained its objections. Pabst agreed to rework the agreement and gave the five copies of the analysis to the Union. Whereupon Trent Chambers embarked on a detailed explanation of the analysis. The Union suggested that Pabst could save $4 million by returning the Heileman production to Milwaukee. Pabst rejected that suggestion and directed the Union's attention to the combination scenario.

Bill Bauman asked the Price Waterhouse auditors for the source of the figures in the Milwaukee Brewery Analysis. I find from Bauman's testimony that either Jozwiak or Chambers replied that Price Waterhouse did not actually audit Pabst's operations and that they had relied on data which Pabst had furnished to them. Bauman's informant also admitted that Price Waterhouse had not checked the accuracy of any of the data which Pabst had provided to the auditors.

Harvey Adelstein explained that the current split of production between Heileman and Milwaukee was creating an annual loss of $8.6 million. He stated that Pabst could not afford to continue losing money. Adelstein warned that if the Union did not make the necessary concessions, Pabst would move all the remaining Milwaukee production to Heileman. He proposed that the Union shoulder 48 percent of the projected loss which translated into concessions totaling $5,960,000 per year. Adelstein also said that the retirees' health plan would be eliminated, providing $3.5 in further savings. He stated that Pabst was seeking concessions totaling $2,460,000. Bill Bauman protested the extent of Pabst's demand for concessions and its plan to eliminate the retirees' health plan. In responding, Adelstein asserted that Pabst was doing the best it could, but had no other ideas to keep the Milwaukee plant "viable."

Bauman asked if Pabst could move the Heileman and Stroh's production back to Milwaukee. Adelstein rejected any consideration of such moves. He said that Bauman's suggestion was not an option. Adelstein asserted that Pabst had no intention of breaking the Heileman agreement and paying the penalty. He also dismissed the idea of returning the Stroh production to Milwaukee, commenting that the Stroh's agreement "is impossible." Adelstein insisted that the solution was termination of the retirees' health plan and $2.4 million in concessions from the Union. Union President Kopplin asked when Pabst had signed the Stroh's agreement. Adelstein answered that he did not know, but he believed there was a renewal of that agreement.

The union negotiators caucused to consider the Price Waterhouse analysis and Edelstein's remarks. When the Union returned to negotiations, Bauman accused Pabst of not bargaining in good faith and complained that Pabst had created the current situation by embarking on the Heileman agreement. Bauman announced that the Union would not accede to Pabst's plan to eliminate the retirees' health plan. However, he said the Union was flexible and wanted to have jobs provided in Milwaukee. Bauman warned that given Pabst's demands for concessions and its attitude toward retirees' benefits, the Union would be unable to obtain ratification of an agreement from its members.

Adelstein responded, denying that Pabst was bargaining in bad faith and insisting that its objective was to keep the Milwaukee plant open. He said Pabst was doing the best it could to come up with a formula for achieving that objective, but saw no other way to get the numbers it needed.

The Union rejected Pabst's confidentiality letter and returned the five copies of the Price Waterhouses analysis to Pabst's negotiators. At the same time Bauman suggested the need for a Federal mediator. He closed his remarks by saying that the Union was available, subject to the call of the mediator. That same evening, Gary Lewitzke notified Bauman that Pabst had contacted a Federal mediator, Gary Liesecki and that Bauman should get in touch with Liesecki.

Bauman telephoned Liesecki on July 11, reached a voice mail recording, and left a message. On July 12, Liesecki returned Bauman's call, but did not reach him. Thereafter, with Liesecki's assistance, the parties agreed to meet on July 25.

In a letter dated July 11, Lewitzke complained that the Union was not complying with its previous agreement to be available for negotiations on July 11 and 12. In the same letter, Lewitzke expressed disappointment at the Union's rejection of the Price Waterhouse analysis. Lewitzke's letter also requested written confirmation that Bauman, Kopplin, and the Union's attorney, George F. Graf, would treat the information which they obtained from the analysis as confidential.

On the same day, Pabst filed an unfair labor practice charge in Case 30–CB–3914, alleging that the Union had violated Section 8(b)(3) of the Act by failing to bargain in good faith. Specifically, Pabst alleged that the Union had refused to attend a bargaining session with a Federal mediator on July 11, and had canceled two scheduled meetings, on the pretext that the Union needed to review information which it had returned to Pabst on July 10. Thereafter, this charge was dismissed. Pabst did not appeal the dismissal.

In a letter to Lewitzke, dated July 15, Bauman denied Pabst's allegations that the Union had failed to bargain in good and contended that Pabst had violated a collective-bargaining agreement and Federal law by transferring production to Heileman, and that Pabst was not bargaining in good faith in the current negotiations.

On July 18, Bauman, by letter to Lewitzke, requested copies of Pabst's current production agreements with Heileman and Stroh, respectively. In this letter, Bauman reminded Lewitzke that during negotiations on July 10, Pabst had insisted that it could not return production to Milwaukee from either Heileman or Stroh because of those agreements. Bauman requested that Pabst provide both copies to the Union at their next scheduled meeting, on July 25, "for the purpose of collective bargaining on a new labor agreement."

When the parties resumed negotiations on July 25, Gary Liesecki of the Federal Mediation and Conciliation Service was present. He caucused with each side, separately. When the parties returned to the meeting, Pabst distributed copies of its first complete contract proposal, including economic and noneconomic provisions. However, Pabst did not have enough copies for all members of the Union's negotiating team and made arrangements to obtain additional copies.

In the meantime, Bauman asked Adelstein if Pabst had the information sought in the Union's letter of July 18. Adelstein handed to Bauman a letter to which was attached a redacted version of the Heileman agreement. Pabst's letter, addressed to Bauman, and signed by Lewitzke, expressly responded to the Union's requests for the Heileman and Stroh contracts in its letter of July 18. In pertinent part, Pabst's letter explained:

> [W]ith respect to the information you have requested, it is our position that you are not legally entitled entitled to *any* of that confidential information. We are, however, willing to provide certain of that information in an effort to further negotiations for a new collective bargaining agreement. If you can demonstrate the relevance and necessity of obtaining any additional information with greater specificity than that contained in your brief letter of July 18, we will reevaluate our position.
>
> In particular, your letter requests a copy of the agreement between Pabst Brewing Company and the G. Heileman Brewing Company (the "Heileman Agreement"). As we have stated repeatedly in the past, that document is highly sensitive and extremely confidential. Your letter states that the basis of the Union's request for a copy of the Heileman Agreement is the Company's statement that returning 1.4 million barrels of production from Heileman would constitute a breach of that contract. Without waiving or in any way minimizing the confidential nature of the Heileman Agreement, and in light of your stated purpose for requesting the information, we have attached hereto a copy of the Heileman Agreement which has been appropriately redacted to protect our legitimate and serious confidentiality concerns while at the same time providing the critical information to support our earlier statements.

Pabst's letter went on to question the relevance of its Stroh agreement to the current collective-bargaining agreement. Pabst's letter asserted that Pabst and Stroh have had a contractual arrangement since 1988 regarding the production of Pabst beverages for distribution and sale on the East Coast, and in the Northeast and Southeast. Further, the letter pointed out that "the concept of transferring barrelage from Stroh to the Milwaukee Division is not a subject for bargaining." The letter asserts that the transportation costs of producing the Stroh barrelage at Milwaukee for sale and distribution to the East Coast, Northeast, and Southeast "would be prohibitive." This assertion is followed by a declaration that the "details of the arrangement between Pabst and Stroh are irrelevant to the current negotiations." The letter finally deals with the Union's request by stating that Pabst has no obligation "to provide any details of any existing arrangement with Stroh."

Bauman objected to the redaction of the Heileman agreement which Pabst had provided to the Union. He noted that some of the information contained in the unredacted version had been included in the letter of intent, which the Union already had seen. Bauman wanted to see the entire agreement.

Lewitzke presented Pabst's contract proposals in detail. Pabst's proposals included

reduction of vacations from 8 weeks to 2 weeks, deletion of four holidays, reduction of bargaining unit hour wages by $2.11, elimination of retiree health benefits, requiring active employees to contribute toward the cost of their health insurance, elimination of paid lunch time, and the imposition of a 10–hour workday and a 4–day workweek. The term of the proposed contract would be 1 year.

The Union rejected the proposal to eliminate the retirees' health benefits. Harvey Adelstein insisted that Pabst would implement this proposal unilaterally. Bauman said the Union would agree to modification, but would not agree to their complete elimination.

Bauman asked Pabst for the data and analyses it used to support its economic proposals. He also asked Pabst for the savings it expected to realize from each of the proposed concessions. Bauman asked Pabst to provide explanations of how it intended to implement its vacation and holiday reductions, its proposed elimination of the 30–minute paid lunch period, and its 10–hour day and 4–day workweek. He asserted that the Union needed the requested information to analyze Pabst's proposals and suggested that negotiations would resume only after the Union had received the requested information and had an opportunity to prepare a response. Bauman proposed that negotiations be recessed subject to the call of the mediator. Harvey Adelstein replied that Pabst would provide the requested information as soon as it could, possibly in the following week. He agreed to recess, subject to the mediator's call. However, July 25 was the last of the nine times the parties met for negotiations in 1996. They maintained contact through correspondence.

On August 1, Bauman received a hand-delivered letter from Pabst responding to the Union's request for the savings expected from Pabst's proposals and how Pabst calculated those savings. Attached to Pabst's letter was a detailed analysis showing the savings its expected to realize from each economic proposal calling for a concession. In addition, Pabst also attached to its letter an outline of the proposed methods for implementing its proposals regarding vacation scheduling, the 4-day week schedule, a 10-hour day schedule, and the unpaid lunchbreak. In the same letter, Pabst repeated its intention to terminate retiree health benefits, and declared its further intention to eliminate death benefits for current retirees to save approximately $275,000.

Pabst's letter strongly suggested that the Union review the attached information and prepare for a quick resumption of negotiations. The letter offered August 6, 7, and 8 as meeting dates, and declared: "Time is of the essence."

The Union, by a letter dated August 5, signed by Bauman, responded to Pabst's letter of August 1. In its response, the Union stated that it has not had "adequate time" to analyze the data which Pabst furnished and Pabst's contract proposals. Further, the Union complained that "the data furnished is incomplete and erroneous." However, the letter did not disclose why the Union found the information which accompanied Pabst's letter to be "incomplete and erroneous." The Union's letter complained that Pabst had "refused to provide any information regarding its Stroh agreement." The letter also asserted that the redacted version of the Heileman agreement, which Pabst had provided to the Union, was inadequate. The Union scolded Pabst for its "failure to provide full and complete information in a timely manner and [its] failure to set forth a comprehensive, written proposal until August 1 . . . ."

The Union's letter points out that Pabst could save $4 million by returning the Heileman barrelage to Milwaukee. The letter went on to protest Pabst's refusal to provide the full text of the Heileman agreement to the Union, as requested. The letter points out that Pabst was

relying on that agreement as ground for rejecting the Union's suggestion and was preventing the Union from verifying Pabst's contention.

The letter attacks Pabst proposals as follows:

> The Company's untenable concessions demands are so outrageous they have made it impossible for you to bargain in good faith with the Union. Additionally, your proposals do not address the needs of our members, i.e. job and income security; secure retirement with dignity; fair and equitable conditions of employment.

Bauman rejected Pabst's suggestion that the parties resume negotiations. He saw no constructive purpose for such meetings "at this time."

By letter dated August 9, Pabst responded to the Union's letter of August 5. Signed by Lewitzke, Pabst's letter rejects the Union request for the Stroh and Heileman agreements and declares that Pabst has provided all requested information relevant to the Union's duties as a collective representative. However, in this letter, Pabst, in a reference to its Stroh agreement, offered to provide to the Union data "detailing the significant and prohibitive transportation costs that would be associated with producing the East Coast and Southeast market products in Milwaukee."

Pabst's letter argued that its contract proposals were timely and that it was the Union who was dragging its feet about counterproposals and the choice of meeting dates. Lewtizke warned that "time is of the essence," and that Pabst "cannot, and will not, be forced to continue to sustain significant losses which could be largely avoided if the Union would address [Pabst's} proposal." Pabst's letter expressed optimism about the possibility that the parties can arrive at a new collective-bargaining agreement. The letter goes on to urge the Union to return to the bargaining table and suggests the selection of meeting dates during the period from August 13 through August 23.

The Union, by Bauman's letter dated August 12, continued the argument. Bauman invited Pabst to provide the information regarding the transportation costs related to the Stroh agreement. Bauman asserted the Union's need for data from Pabst's books and records. Continuing, Bauman's letter repeated his request of July 25 for the full text of the Heileman agreement and the data and analyses Pabst had used to support its economic proposals. The letter asserted that the Union needed this data to verify Pabst's "claims."

Turning to another topic, the last paragraph of Bauman's letter reported that the Union had received "persistent reports from Company salaried personnel that Pabst has plans, in fact, to close its Milwaukee brewery on or about November 1, 1996, or in the very near future." The letter ended with a request for "full information regarding such plans."

In response to Bauman's letter of August 12, Lewitzke's letter of August 14 announced that Pabst was compiling the transportation cost data pertaining to its Stroh production agreement. As soon as that process was completed, Pabst would send it to the Union. Lewitzke labeled the reports of imminent closure of Pabst's Milwaukee plant as "unattributed and undocumented 'reports.'" He assured the Union that Pabst would keep the Union "informed of plans relating to the future of the Milwaukee Brewery." Lewitzke concluded his reponse to the Union's inquiry as follows: "At this time there is nothing to comment on that has not already been discussed with you in negotiations or by letter." Finally, Lewitzke declared Pabst's expectation that the parties would succeed in arriving at a collective-bargaining

agreement and its readiness to resume negotiations quickly. On August 21, Pabst sent documentation of the cost differential related to shipping from Milwaukee its products currently produced by Stroh.

On August 26, Pabst delivered its final proposal to the Union. In an accompanying letter, Pabst notified the Union this proposal would remain open for acceptance until midnight, September 3, or until the Union notified Pabst of its acceptance or rejection. By letter dated August 28, the Union advised Lewitzke that Pabst's final proposal was incomplete and that, as Bauman read the final proposal, Pabst was restoring medical and dental insurance for pre–65 retirees. Bauman also noted that Pabst's proposal would rescind vacation benefits earned by unit employees in 1995. Lewitzke responded on August 28 with clarification of Pabst's final proposal.

In a letter dated August 30, Bauman repeated the Union's request for a copy of Pabst's production agreement with Stroh. In the same letter, Bauman suggested that, assuming the expiration of the Stroh agreement, Pabst could reallocate that production to a Heileman plant in the eastern United States, return the La Crosse production to Milwaukee and continue to enjoy the lower shipping costs which the expired agreement afforded. In his letter, Bauman explained that in 1995, Lewitzke had stated that the Stroh agreement would expire in 1996. Bauman was basing his assumption on the possibility that the Stroh agreement had expired without renewal.

In a separate letter dated August 30, Bauman, on the Union's behalf, rejected Pabst's final proposal. Bauman declared the Union's readiness to negotiate a new collective-bargaining agreement and its "very flexible" positions on "substantive matters." However, he asserted that the Union would not agree to Pabst's "unreasonable demands nor acquiesce to [Pabst's] repeated violations of federal law and [Pabst's] violations of our contract."

By letter dated September 4, Lewitzke extended the deadline for the Union's acceptance or rejection of Pabst's final offer until September 6. Bauman's reply, dated September 6, repeated the Union's demand for a copy of the Stroh production agreement. In addition, Bauman rejected the final offer.

On September 13, Lewitzke notified the Union, by letter, that Pabst had concluded that the parties had "reached a bargaining impasse." Accordingly, Lewitzke announced that effective September 16, Pabst would implement the proposal attached to the letter, in the bargaining unit. I find from the testimony of its witness, Dan Perks, that Pabst implemented its proposal on and after September 17.

2. Analysis and conclusions

The General Counsel contends that Pabst violated Section 8(a)(5) and (1) of the Act by refusing since July 10 to entertain the Union's proposal to return the bargaining unit work to Milwaukee from Heileman, by failing to provide the Union with requested copies of Pabst agreements with Heileman and Stroh, respectively, by failing to provide the Union with Pabst's "costing methodology and the supporting data from [Pabst's] books and records used to support [Pabst's] claims for economic relief," and by failing to present a complete bargaining proposal until July 25. Pabst urges rejection of these contentions on the ground that its conduct in the 1996 negotiations did not violate its obligation to bargain in good faith as prescribed by

Section 8(d) of the Act.[8]

There was no showing that Pabst and the Union intended that the management-rights provisions in their most recent contract would survive the contract. Therefore, under Board policy, on the expiration of the parties' most recent collective-bargaining agreement on June 1, Article XVI, the agreement's management-rights clause also expired. *Furniture Renters of America, Inc.*, 311 NLRB 749, 751 (1993). Thus, the Union's waiver of its right to bargain about Pabst's decisions to contract out unit work was no longer in effect on July 10. I also find that on that date, when the Union suggested moving the Heileman and Stroh production back to Milwaukee it was presenting a proposal to preserve and recapture bargaining unit work. Thus, the Union was attempting to bargain about a matter in which it had a primary interest as the representative of the Milwaukee plant employees. *Teamsters (California Dump Truck Owners Assn.)*, 227 NLRB 269, 272 (1976).

The Union's effort on July 10, to explore the return of bargaining unit work, involved a mandatory subject of bargaining. See *Furniture Renters of America,* above, at 750–751. By summarily rejecting the Union's proposal on July 10, Pabst failed to meet its obligation under Section 8(d) of the Act to bargain, and thereby violated Section 8(a)(5) and (1) of the Act.

The Board has found that an employer's failure to make a timely wage proposal in the course of collective bargaining violated Section 8(a)(5) and (1) of the Act, where the delay exceeded 4 months and the excuse the employer offered to the employees' bargaining representative for the delay was "misleading." *Whisper Soft Mills, Inc.*, 267 NLRB 813, 814–815 (1983), rev. on other grounds 754 F.2d 1381 (9th Cir. 1984). The Board has also found that an employer violated Section 8(a)(5) and (1) of the Act by failing to make a complete wage package proposal until the penultimate bargaining session preceding the expiration of the union's certification year. *Viking Connectors Co.,* 297 NLRB 95, 106 (1989). Although the employer in *Viking* took 3 months to come up with a complete wage proposal, the Board focused on direct evidence that the motive for the delay was to avoid reaching agreement until the employer "could attempt to withdraw recognition of the [union] as representative of its employees." Id. at 107. The Board has found that a delay of only 18 days by an employer in the presentation of its wage proposal constituted unlawful bargaining conduct, where the presentation occurred only 4 days prior to the expiration of an existing collective-bargaining agreement. *Horsehead Resource Development Co.*, 321 NLRB 1404 (1996). In *Horsehead*, the Board found that the timing of the presentation of the wage proposal was one aspect of a course of conduct "that undermined the negotiating process." Ibid. Consistent with the Board policy reflected in these three cases, I shall assess the extent of the delay in Pabst's presentation of its economic proposal and the context in which it occurred.

Pabst and the Union began negotiations for a new collective-bargaining agreement on May 1. At that session, Pabst presented its noneconomic contract proposals. The Union presented its economic proposals to Pabst in a letter dated May 24. As of that date, Pabst had not presented an economic proposal to the Union.

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[8] Sec. 8(d), in pertinent part, defines the duty to bargain collectively as "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party."

After their initial meeting, the parties met on May 13, 21, 22, 30, and 31. During the meeting on May 30, the Union asked Pabst for an economic proposal. Pabst replied that its non–economic proposal included part of its economic proposal. The Union asked Pabst about a wage proposal. Pabst answered that it was not ready to discuss a wage proposal. The Union asked if Pabst could have a comprehensive proposal on the following day. Lewitzke, replying for Pabst, said yes. However, in his testimony before me, Lewitzke admitted that as of May 30, Pabst had not resolved its economic proposal. At the negotiations on May 31, the Union complained that Pabst had not made a comprehensive proposal. Pabst's attorney, Adelstein, acknowledged that Pabst did not have such a proposal to present.

On June 17, Pabst's attorneys engaged the accounting firm of Price Waterhouse to prepared financial analyses of Pabst's Milwaukee brewing operations. In a letter to Attorney Adelstein and Neal Gerber & Eisenberg, dated June 17, Price Waterhouse expressed its understanding that Pabst's attorneys would use these analyses for its negotiations with the Union and "NLRB matters." The terms of engagement also provided that Price Waterhouse would not perform an audit but would base its analyses on data which Pabst would provide.

Review of the 69-page bound volume entitled "Milwaukee Brewery Analysis" shows that Price Waterhouse obtained data from Pabst for the period July through December 1995, the 4 months ended April 1996, the 4 months ended April 1995, manufacturing costs for April 1996, under the Heileman agreement, container costs for the month of April 1996 at both Heileman and at Milwaukee, and estimates of costs for the period May through June 1996. Price Waterhouse presented this 69-page analysis in time for negotiations between Pabst and the Union on July 10. According to Harvey Adelstein's testimony, he needed help to provide the Union with "as much comprehensive information as possible of an economic nature."

However, neither Adelstein nor any other Pabst witness testified that the 69 page analysis was necessary to enable Pabst to make an economic proposal prior to July 25. Indeed, Adelstein testified that prior to June 14, Pabst was withholding its wage proposal because it wanted to obtain some agreements from the Union on non–economic proposals. He also testified that the major hurdle to resolving non–economic issues was the Union's insistence on guaranteed jobs for 52 weeks for all the employees on the seniority list. However, neither Lewitzke nor Adelstein mentioned this "major hurdle" to the Union when explaining why Pabst had not made a comprehensive economic proposal to the Union.

When the parties met on June 18, the Union asked if Pabst had an economic package to present. Pabst replied: "No, not at this time." The Union asked if Pabst was saying it did not have a complete contract proposal. Pabst replied that it had not completed its economic proposal and suggested that the Union respond to Pabst's non–economic proposals. The Union insisted that it could not properly negotiate without knowing the extent of Pabst's economic demands.

Negotiations resumed on June 19. Pabst's attorney, Adelstein, asserted that Pabst had no economic proposal for the Union. The Union's lead negotiator, Bauman pointed out that 19 days had gone by since the expiration of the parties' last collective-bargaining agreement and yet Pabst had no economic proposal. Adelstein replied that Pabst was not in a position to present an economic proposal, but was working on it with outside auditors. He assured the Union that as soon as that review was completed, Pabst would be ready to discuss economics.

In a letter dated June 21, the Union complained that Pabst had not supplied it with " a

full and complete comprehensive offer." In a responding letter dated July 2, Pabst announced resumption of negotiations on July 10, 11 and, if necessary, on July 12. In the same letter, Pabst advised that it was bringing its outside auditors to the next meeting and suggested that the Union also bring its financial experts or economists to the next meeting.

When the parties met on July 10, Pabst provided a detailed explanation of the Price Waterhouse analysis. Pabst also proposed elimination of the retirees' health benefits and announced that it was seeking concessions from the bargaining unit totaling $2,460,000. However, Pabst did not present a detailed economic proposal showing how it proposed to achieve the concessions.

Finally, on July 25, Pabst distributed copies of its first complete contract proposal to the Union's negotiators. This proposal included economic and noneconomic provisions. Thus, Pabst presented its first complete economic proposal almost 3 months after bargaining had begun on a new contract, and 55 days after the expiration of the parties' 1993 collective-bargaining agreement.

At the bargaining table, Pabst's negotiators blamed the lengthy delay in the presentation of its economic proposal on its need for help from outside auditors. Almost 7 weeks of this delay is attributable to Pabst's failure to obtain the outside auditors on May 1, when negotiations began. Pabst has not offered any explanation for this delay. Nor has Pabst explained why its comptroller at Milwaukee could not provide the analysis necessary for development of an economic proposal in May.

Pabst waited for the hearing in these cases to present an additional reason for the delay, the Union's insistence on 52 weeks of job security for all the employees on the Milwaukee seniority list. Yet, Pabst never made any effort to negotiate over this issue. That Pabst waited until the hearing in these cases to raise the job security issue as an impediment to its timely presentation of an economic proposal, suggests that it was an afterthought, hastily raised to excuse its misconduct. Further, assuming that Pabst had seen the demand for job security for all the employees on the bargaining unit's seniority list as a stumbling block to formulation of an economic proposal, failure to raise the matter with the Union afforded Pabst a convenient excuse for the delay. I find that Pabst's delay in presenting its economic proposal reflected an intent to undermine the collective–bargaining process. I further find that Pabst's delay violated Section 8(a)(5) and (1) of the Act. *Viking Connectors,* above, 297 NLRB at 106.

Pabst's statutory duty to bargain arising under Section 8(a)(5) and (1) of the Act included the duty to furnish relevant information needed by the Union to understand and intelligently discuss the issues raised in the collective–bargaining process. *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863, 866–867 (9th Cir. 1977). The standard for assessing the relevance of the information request by the Union in these cases is "a liberal one, much akin to that applied in discovery proceedings." *Detroit Newspaper Printing & Graphic Communications Union Local 13 v. NLRB*, 598 F.2d 267, 271 (D.C. Cir. 1979).

Information relating to wages, hours, and other terms and conditions of employment was presumptively relevant and necessary for the Union to perform its bargaining obligation in the 1996 negotiations. *Oil Workers v. NLRB*, 711 F.2d 348, 359 (D.C. Cir. 1983). Pabst was required to disclose such requested information unless it proved a lack of relevance or "provide[s] adequate reasons why [it] cannot, in good faith, supply the information." *NLRB v. Borden, Inc.*, 600 F.2d 313, 317 (1st Cir. 1979). However, the rule regarding a union's entitlement to an employer's financial data is different. No such presumption of relevance applied when the Union sought financial information from Pabst on July 25 and in the Union's

letter of August 12. For the general rule is that such information must be disclosed only if the union first demonstrates that it is specifically relevant to the bargaining in progress. *Atlanta Hilton & Tower*, 271 NLRB 1600, 1602 (1984). An employer is not required to produce financial data "merely because it would be 'helpful' to the union." Ibid.

However, if an employer seeking economic concessions puts its profitability into issue by claiming an "inability to pay" certain wages, then the financial information substantiating the claimed inability is relevant and must be disclosed. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–153 (1956). Here, on and after July 25, Pabst demanded economic concessions on the ground that it was unable to provide the wages and benefits required under the recently expired collective-bargaining agreement. Under Board policy consistent with *Truitt*, above, the Union was entitled to verify that claim from Pabst's financial data. *Shell Co.,* 313 NLRB 133 (1993). On July 10, Pabst presented its analysis of its Milwaukee brewery operations and asserted that $2.4 million in economic concessions by the bargaining unit employees were necessary to keep that brewery going. At the next negotiating session, on July 25, Adelstein reminded the Union that Pabst was losing money at Milwaukee, $33,000 per day.

On receiving Pabst's economic contract proposals on July 25, the Union asked for the data and analyses Pabst had used to support them. On August 12 the Union reacted to Pabst's failure to provide the requested data and analyses Pabst had used to support its economic proposals. The Union, by letter dated August 12, complained that Pabst had provided the Union with neither the "supporting data from the Company's books and records of accounts" nor "full disclosure of [Pabst's] costing methodology." The Union's letter goes on to repeat its request for "all the information to verify [Pabst's] claims." Pabst did not comply with the Union's repeated requests for the financial data and the costing methodology pertaining to Pabst economic contract proposals. Thus, Pabst deprived the Union of information necessary to verify Pabst's claimed financial condition and the reductions in wages and benefits which Pabst sought as a result of its asserted losses at Milwaukee. Accordingly, I find that Pabst, by failing and refusing to provide the requested financial data and costing methodology to the Union, violated Section 8(a)(5) and (1) of the Act. *Shell Co.,* above.

I also find, contrary to Pabst's contentions, that the Union was entitled to unredacted copies of both the Heileman agreement and the Stroh agreement, which it repeatedly requested in July and August. These agreements covered fermented malt beverage production which Pabst had contracted out, instead of producing it at its Milwaukee facility. The record shows that the Union was seeking these agreements to review them and see if they contained provisions which would permit Pabst to restore at least some of the contracted production to the bargaining unit at Milwaukee. As I have found above at page 28, the issue of recapturing unit work from Stroh and Heileman was a mandatory subject of bargaining. By reviewing Pabst's production agreements with Stroh and Heileman, the Union would have seen for itself whether either of them included any provision which would permit the return of at least some of the lost production to the Milwaukee brewery. If the agreements had no such provision, the Union would learn that further negotiations to return production would be futile. I find therefore that these agreements had information which was potentially necessary for contract negotiations. Thus, access to the requested agreements would enable the Union to carry out its responsibility as exclusive bargaining representative intelligently.

The redacted version of the Heileman agreement, which Pabst provided to the Union on July 25 was insufficient. The Union was entitled to the entire agreement to see for itself if there was any provision in the redacted portion which would permit Pabst to return some production to Milwaukee. Pabst's claim, in its letters to the Union, and in its posthearing brief, that a need

for confidentiality barred the Union from access to the entire agreement was not a valid excuse for limiting the Union to a redacted version. As I have pointed out above, at page 17, Board law required that Pabst offer to accommodate its concern for confidentiality with the Union's entitlement to the Heileman agreement. *Pennsylvania Power Co.*, 301 NLRB 1104, 1106 (1991). Pabst made no effort to satisfy that requirement.

In sum, I find that Pabst's repeated failure and refusals to provide the Union with the requested copies of the Heileman and Stroh production agreements constituted further violations of its duty to bargain in good faith. Accordingly, I further find that by those refusals, Pabst violated Section 8(a)(5) and (1) of the Act.

On September 13, Pabst notified the Union that the parties had "reached a bargaining impasse and that effective September 16, Pabst would implement its final contract proposal in the Milwaukee bargaining unit. On and after September 17, Pabst put its final contract proposal into effect at its Milwaukee brewery. It is settled law, that an employer violates its obligation to bargain in good faith when, absent an impasse in negotiations, it changes employees' terms and conditions of employment *NLRB v. Katz*, 369 U.S. 736, 741–743 (1962); *Reece Corp.,* 294 NLRB 448, 453 (1989). However an employer cannot claim a valid impasse where it has engaged in unfair labor practices in the bargaining process leading up to the asserted impasse. *Park Inn Home for Adults,* 293 NLRB 1082, 1087 fn. 9 (1991).

I have found above, that prior to September 13, Pabst violated Section 8(a)(5) and (1) of the Act by flatly refusing to bargain about returning unit work to the Milwaukee facility, unreasonably delaying the presentation of its complete economic proposal, and by failing and refusing to provide the Union with requested bargaining information. I also find that, by this conduct, Pabst has engaged in overall bad-faith bargaining, designed to frustrate the bargaining process, and thus has further violated Section 8(a)(5)and (1) of the Act. *Bradford Coca-Cola Bottling Co.*, 307 NLRB 647 (1992). In light of these unfair labor practices, Pabst cannot claim that a legally cognizable impasse existed on that date. *Park Inn Home for Adults,* above, 293 NLRB at 1087 fn. 9. I further find, therefore, that Pabst's unilateral implementation of its final contract proposal on September 17, which it had presented to the Union on August 26 and had clarified on August 28, also violated Section 8(a)(5) and (1) of the Act. *Reece Corp.,* supra, 294 NLRB at 453; *I.T.T. Rayonier, Inc.,* 305 NLRB 445, 446 (1991).

C. The Closing of Pabst's Milwaukee Brewery

1. The facts

I find from the testimony of Pabst's Executive Vice President William Bitting that in the first week of October, "Pabst was short of cash, they were in a cash crunch." Continuing, Bitting defined "cash crunch" as follows;

> You don't have sufficient accounts receivable, your accounts payable are greater than your accounts receivable and your borrowing base is extended, your borrowing capabilities extended to the fullest, so that everyday, you are on a day to day basis in your cash position. You are short of cash. And you've got a debt sitting there of some 40— somewhere between 30 and 40 million dollars that you have no way to amortize over the next fiscal year.

In August 1996, Dan Perks, a certified public accountant, who is a partner in the accounting and consulting firm of Price Waterhouse, was engaged by Pabst to evaluate the operations of its Milwaukee brewery for the 6 months ended December 31, 1995, for the 9

months ended on September 30, and to do a projected evaluation for the year ending December 31, 1997. Perks was to accomplish his detailed analysis in preparation for his testimony at the hearing before me. Pabst did not rely on Perks' work when it decided to terminate its Milwaukee production. However, I have found his expertise helpful in understanding Pabst's financial plight in October 1996.

I find from Perks' testimony that in October 1996, Pabst's Milwaukee brewery was "in a severe significant cash crunch." He summed it up as follows: " [T]he long and short of it is, Pabst Brewing of the Milwaukee facility was out of cash, a severe cash crunch." Aside from a loan obligation to a group of banks, Perks attributed the cash crunch to "a negative cash flow of some one million to 1.3 million dollars for the first quarter of fiscal '97, quarter ending September 30."

Pabst's current chief financial officer, Darrin Campbell reviewed and assessed the liquidity situation at Pabst's Milwaukee facility in September 1996. He assured himself that the financial information available to him from the Milwaukee brewery was reliable. Cambell visited Pabst's breweries at Tumwater, Washington, and at San Antonio, Texas. He concluded that Pabst's Milwaukee plant "had the most serious financial problems." Campbell spent 2 weeks at the Milwaukee brewery performing his "own mini–audit."

In early October 1996, Campbell received the Milwaukee facility's income statement for the first quarter of its fiscal year, which ran from July 1 until September 30. Campbell reviewed the statement and discussed it with various accounting personnel at Pabst's Milwaukee facility, verified each line item and determined that no material changes were to be made. His analysis of the Milwaukee plant's cash flow for the first quarter of 1997 showed average monthly cash losses of approximately $1.3 million. Campbell's review showed that over the 3-month period ending September 30, the Milwaukee facility's pretax loss of roughly $3.5 million. Campbell completed his analysis on October 7.

On October 8, Campbell telephoned Executive Vice President Bitting and informed him that Pabst's Milwaukee facility was losing an average of $1.3 million per month in cash and had done so for the first quarter of fiscal 1997. Campbell also advised Bitting that Pabst's Milwaukee facility would experience no change in the current trend for the next 6 months, and thus would experience a monthly cash loss during that period of $1 to $1.3 million. Campbell saw the low production at Milwaukee as the "critical element" in this negative cash flow. In his view, Pabst's Milwaukee brewery would continue to experience losses as long as its monthly production was 50,000 barrels or less.

On hearing Campbell's report that Pabst's Milwaukee operation was losing $1.3 million per month, Bitting said, "I don't think we have any choice." From Campbell's report, Bitting saw that this negative cash situation "was something that had happened and was going to continue to happen." In Bitting's view, Pabst could not obtain much if any credit. He also believed that "at a rate of $1.3 million a month, we were going to be out of business pretty quick, if we continued on that course of action." Campbell and Bitting did not discuss the specific causes of the losses. They did not mention labor costs at Milwaukee as a factor in Pabst's financial plight. Bitting assumed that "anything that costs to run the [Milwaukee] plant contributed to the loss."

Later, on the same day, Bitting telephoned Pabst's board chairman and president, Lutz Issleib, and reported Campbell's findings. Bitting told Issleib that "we're losing an enormous amount of money on a monthly basis and I don't think you have any choice but to close the brewery." Bitting and Issleib spent 2 minutes discussing this recommendation, without raising

labor costs or the Union at Pabst's Milwaukee facility. They decided to close the Milwaukee brewery.

Reviewing Perks' credited testimony, I find that, given Pabst's intention to produce and sell 500,000 bbls. of beer at its Milwaukee brewery, for the year ending December 31, 1997, and if the approximately 130 bargaining unit employees employed on September 30, worked for the minimum wage, $4.88 per hour, and legally obligated fringe benefits, including workers compensation, payroll taxes, and pension, Pabst would have realized a loss of $5.1 million for that calendar year. Perks also prepared an analysis for the same period, which showed that, if Pabst produced and sold 500,000 bbls. at Milawukee, for the year ending December 31, 1997, and the Union's bargaining unit employees employed on September 30, worked for nothing for the entire year of 1997, Pabst would lose $3.8 million for that calendar year. Perks analysis showed that for the first quarter of Pabst's fiscal 1997, Milwaukee was suffering a monthly loss of approximately $1.3 million. The record showed that demand for Pabst's malt beverages was diminishing during its fiscal quarter ending September 30. During that quarter, when, according to Bidding and Perks, demand for Pabst products was highest, Milwaukee produced only 104,671 bbls. of malt beverages. Thus, the possibility that demand would warrant the production of 500,000 bbls. at Milwaukee appeared unlikely on October 8, when Bidding and Issleib decided to close that facility.

By letter to Bauman, dated October 17, Lewitzke notified the Union that Pabst was transferring its current production to Heileman. Continuing, the letter pointed out that this decision would "result in the indefinite layoff of all bargaining unit employees and the cessation of operations for an indeterminate period of time." The letter gave notice that Pabst would implement this decision "as soon as possible, but no later than the end of the year."

2. Analysis and conclusions

The General Counsel and the Union contend that Pabst violated Section 8(a)(5) and (1) of the Act since October 17, by announcing the closing of the Milwaukee brewery, the indefinite layoff of all bargaining unit employees and the transfer of the remaining bargaining unit work to Heileman. Pabst argues that under Board policy expressed in *Dubuque Packing Co.*, 303 NLRB 386 (1991), enfd. in pertinent part sub nom. *Food & Commercial Workers Local 150-A v. NLRB*, 1 F.3d 34 (D.C. Cir. 1993), it had no duty to bargain about the announced decisions. I find merit in Pabst's position.

In *Dubuque Packing*, above at 391, the Board adopted the following test for deciding whether an employer's decision to relocate is a mandatory subject of bargaining:

> Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel successfully carries his burden in this regard, he will have established prima facie that the employer's relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the prima facie case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or establishing that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect were not a factor in the decision or (2) that even if labor costs were a

factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate.

In the instant case, the General Counsel has shown that Pabst's decision to close its Milwaukee facility and move the remaining beer production to Heileman's La Crosse brewery impacted on bargaining unit work, but was not accompanied by a basic change in the nature of Pabst's operation. Thus, the record shows that Pabst continues to produce, sell, and distribute beer and related products at its Tumwater, Washington, and San Antonio, Texas facilities and that it continues to sell and distribute beer and related products produced for it under contracts with Heileman and Stroh. However, Pabst has shown by Executive Vice President Bitting's credited testimony that labor costs, direct and /or indirect, at Milwaukee were not a factor in his and President Isslieb's decision on October 8 to close the Milwaukee facility.

Moreover, Perk's undisputed testimony showed that, assuming continued production at the rate of 500,000 bbls. per year, even if the bargaining unit employees had agreed, through their bargaining representative, the Union, to work for no wages, Pabst would continue to suffer an annual loss of $3.8 million at that facility. However, the record shows that demand for Pabst's malt beverages was diminishing and that approximately 419,000 bbls. would be Milwaukee's production for its fiscal year beginning July 1. I find from Perk's analysis and financial data available in the record that even if labor costs had been a factor in the decision to terminate the Milwaukee operation and send the remaining bargaining unit work to Heileman, the Union could not have offered concessions that could have caused Pabst to change this decision. Accordingly, I find that Pabst did not violate Section 8(a)(5) and (1) of the Act by making that decision unilaterally. *Kaumagraph Corp.,* 316 NLRB 793, 801–802 (1995). I shall recommend dismissal of the allegation that Pabst's conduct in this regard violated the Act.

Conclusions of Law

1. The Respondent, Pabst Brewing Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Brewery Workers Local 9, UAW (Amalgamated), AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production, maintenance and other employees employed by Pabst Brewing Company in its Milwaukee Division operations as more fully set forth in the parties' collective-bargaining agreement effective from June 1, 1993, to June 1, 1996; excluding office clerical employees, guards and supervisors as defined in the Act, and all other employees constitute a unit appropriate for collective-bargaining within the meaning of Section 9(b) of the Act.

4. At all times material to these cases, the Union has been the exclusive collective-bargaining representative of all the employees in the appropriate unit described above.

5. By failing and refusing since on or about December 21, 1995, to furnish to the Union a copy of its new 3-year production agreement with G. Heileman Brewing Company, Inc., executed on or about November 10, 1995, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) of the Act.

6. Respondent has engaged in further unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by:

(a) Since on and after July 10, 1996, refusing to entertain a proposal to return

the bargaining unit work contracted to G. Heileman Brewing Company, Inc. under a 3-year production agreement executed on or about November 10, 1995.

(b) Failing and refusing to provide a complete bargaining proposal to the Union until July 25, 1996.

(c) Since on and after July 25, 1996, failing and refusing to furnish to the Union a complete copy of Pabst's 3-year production agreement with G. Heileman Brewing Company, Inc.

(d) Since on and after July 25, 1996, failing and refusing to furnish to the Union a copy of Pabst's current production agreement with The Stroh Brewery Company.

(e) Since August 12, 1996, failing and refusing to furnish to the Union the costing methodology and the supporting data from Pabst's books and records of account used to support its claims for economic relief.

(f) Unilaterally implementing its final offer of August 26, 1996, as clarified by Pabst on August 28, 1996, without having reached a valid bargaining impasse.

(g) Refusing to bargain collectively in good faith concerning wages, hours, and other terms and conditions of employment with the Union.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

8. Respondent has not otherwise violated the Act as alleged in the consolidated complaints.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that Respondent be required to furnish the Union with complete and unredacted copies, respectively, of Pabst's 3-year production agreement with G. Heileman Brewing Company, Inc., executed on November 10, 1995, and of Pabst's production agreement with The Stroh Brewing Company, which was in effect on July 25, 1996. I shall further recommend that Respondent be required to provide the Union with the costing methodology and the supporting data from Pabst's books and records of account used to support its claims for economic relief.

I shall also recommend that Respondent be required to restore the wages, hours, and other terms and conditions of employment of bargaining unit employees to the status quo on September 16, 1996. Further, I shall recommend that Respondent be required to make the bargaining unit employees whole for any losses of wages or other benefits they may have suffered as a result of Respondent's unilateral implementation, on September 17, of its final offer of August 26 and 28, 1996.

All losses of earnings or other benefits due the unit employees because of Respondent's unlawful implementation of terms and conditions of employment on September 17, 1996, shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682

(1970). Interest on such losses will be computed in accordance with the policy set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Pabst Brewing Company, Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively in good faith concerning wages, hours, and other terms and conditions of employment with Brewery Workers Local 9, UAW (Amalgamated), AFL–CIO as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All production, maintenance and other employees employed by Pabst Brewing Company in its Milwaukee Division operations as more fully set forth in the parties' collective-bargaining agreement effective from June 1, 1993, to June 1, 1996; excluding office clerical employees, guards and supervisors as defined in the Act, and all other employees.

(b) Refusing to bargain collectively concerning a proposal by the Union to return the bargaining unit work contracted to G. Heileman Brewing Company, Inc. under a 3-year production agreement executed on or about November 10, 1995.

(c) Failing and refusing to provide a timely complete bargaining proposal to the Union.

(d) Failing and refusing to furnish to the Union a complete copy of Pabst's 3-year production agreement with G. Heileman Brewing Company, Inc.

(e) Failing and refusing to furnish to the Union a copy of Pabst's current production agreement with The Stroh Brewery Company.

(f) Failing and refusing to furnish to the Union the costing methodology and the supporting data from Pabst's books and records of account used to support its claims for economic relief.

(g) Unilaterally implementing terms and conditions of employment without having reached a valid bargaining impasse with the Union.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production, maintenance and other employees employed by Pabst Brewing Company in its Milwaukee Division operations as more fully set forth in the parties' collective-bargaining agreement effective from June 1, 1993, to June 1, 1996; excluding office clerical employees, guards and supervisors as defined in the Act, and all other employees.

(b) On request, bargain with the Union regarding its proposal to return the bargaining unit work contracted to G. Heileman Brewing Company, Inc. under a 3-year production agreement executed on or about November 10, 1995.

(c) On request, furnish to the Union a complete unredacted copy of Pabst's 3-year production agreement with G. Heileman Brewing Company, Inc., a complete unredacted copy of Pabst's current production agreement with The Stroh Brewery Company, and the costing methodology and the supporting data from Pabst's books and records of account used to support its claims for economic relief.

(d) On request of the Union, rescind the unlawful unilateral changes in wages, hours, and other terms and conditions of bargaining unit employees, and reinstate retroactively to September 17, 1996, their rates of pay, wages, hours, and other terms and conditions of employment in effect immediately prior to Respondent's unlawful conduct, and make whole with interest all bargaining unit employees who suffered losses in wages and fringe benefits, as set forth in this decision.

(e) Within 14 days after service by the Region, post at its facility in Milwaukee, Wisconsin copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 21, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that

[10] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. December 19, 1997

_____
Leonard M. Wagman
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail or refuse to bargain collectively in good faith concerning wages, hours, and other terms and conditions of employment with Brewery Workers Local 9, UAW (Amalgamated), AFL–CIO as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All production, maintenance and other employees employed by Pabst Brewing Company in its Milwaukee Division operations as more fully set forth in our collective-bargaining agreement with the Union, effective from June 1, 1993, to June 1, 1996; excluding office clerical employees, guards and supervisors as defined in the Act, and all other employees.

WE WILL NOT refuse to bargain collectively in good faith concerning a proposal by the Union to return the bargaining unit work contracted to G. Heileman Brewing Company, Inc. under a 3-year production agreement executed on or about November 10, 1995.

WE WILL NOT, during bargaining with the Union, fail and refuse to provide a timely complete bargaining proposal to the Union.

WE WILL NOT fail and refuse to furnish to the Union a complete copy of our three year production agreement with G. Heileman Brewing Company, Inc..

WE WILL NOT fail and refuse to furnish to the Union a copy of our current production agreement with The Stroh Brewery Company.

WE WILL NOT, during bargaining with the Union, fail and refuse to furnish to the Union the costing methodology and the supporting data from our books and records of account we used to support our claims for economic relief.

WE WILL NOT unilaterally implement terms and conditions of employment without having reached a valid bargaining impasse with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you employees in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production, maintenance and other employees employed by Pabst Brewing Company in its Milwaukee Division operations as more fully set forth in our collective-bargaining agreement effective from June 1, 1993, to June 1, 1996; excluding office clerical employees, guards and supervisors as defined in the Act, and all other employees.

WE WILL, on request, bargain with the Union regarding its proposal to return the bargaining unit work contracted to G. Heileman Brewing Company, Inc. under a 3-year production agreement executed on or about November 10, 1995.

WE WILL, on request, furnish to the Union a complete unredacted copy of our three year production agreement with G. Heileman Brewing Company, Inc., a complete unredacted copy of our current production agreement with The Stroh Brewery Company, and, the costing methodology and the supporting data from our books and records of account used to support our claims for economic relief during bargaining with the Union.

WE WILL, on request of the Union, rescind the unlawful unilateral changes in wages, hours and other terms and conditions of bargaining unit employees, and reinstate retroactively to September 17, 1996, their rates of pay, wages, hours, and other terms and conditions of employment in effect immediately prior to our unlawful declaration of an impasse in collective-bargaining and make whole with interest all bargaining unit employees who suffered losses in wages and fringe benefits as a result of our unilateral implementation of our "final" offer of August 26 and 28, 1996.

PABST BREWING COMPANY

(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 310 West Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53203–2211, Telephone 414–297–3875.